ECORD
AND
BRIEF

MAR 17 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-529

In the Supreme Court of the United States

CHARLES R. KOKESH, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

SANKET J. BULSARA
Acting General Counsel
MICHAEL A. CONLEY
Solicitor
JACOB H. STILLMAN
Senior Advisor to the Solicitor
HOPE HALL AUGUSTINI
DANIEL STAROSELSKY
Senior Litigation Counsels
SARAH R. PRINS
Senior Counsel
Securities and Exchange Commission
Washington, D.C. 20549

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
MALCOLM L. STEWART
Deputy Solicitor General
ELAINE J. GOLDENBERG
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the Securities and Exchange Commission's equitable claims for disgorgement are subject to the five-year statute of limitations in 28 U.S.C. 2462, which applies to claims for "any civil fine, penalty, or forfeiture."

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 1
Statement 2
Summary of argument 9
Argument 13
A. Disgorgement is not a "penalty" under Section 2462 14
1. As used in Section 2462, a "penalty" is a punishment 14
2. Disgorgement in SEC actions is not a "penalty" .. 16
3. Petitioner's arguments that disgorgement is a "penalty" under Section 2462 lack merit 25
B. Disgorgement is not a "forfeiture" under Section 2462 32
C. Extending Section 2462 to cover disgorgement is inconsistent with the purposes of statutes of limitations and would have harmful consequences 41
D. The canon of narrow construction reinforces the conclusion that Section 2462 does not apply to disgorgement 49
Conclusion 51
Appendix — Statutory provisions 1a

TABLE OF AUTHORITIES

Cases:

Adams v. *Woods*, 6 U.S. (2 Cranch) 336 (1805) 41, 50
Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) 43
Alexander v. *United States*, 509 U.S. 544 (1993) 32
Austin v. *United States*, 509 U.S. 602 (1993).... 34, 35, 36, 38
BP Am. Prod. Co. v. *Burton*, 549 U.S. 84 (2006)..... 29, 49
Badaracco v. *Commissioner*, 464 U.S. 386 (1984) 50
Bell v. *Hood*, 327 U.S. 678 (1946) 18

Cases—Continued: Page

Bigelow v. *RKO Radio Pictures*, Inc., 327 U.S. 251 (1946) 30
Brady v. *Daly*, 175 U.S. 148 (1899) 17, 26
Browning-Ferris Indus. of Vt., Inc. v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989) 28, 34
California v. *American Stores Co.*, 495 U.S. 271 28(1990) 18
Chattanooga Foundry & Pipe Works v. *City of Atlanta*, 203 U.S. 390 (1906) 26
Coghlan v. *NTSB*, 470 F.3d 1300 (11th Cir. 2006) 28
Department of Revenue v. *Kurth Ranch*, 511 U.S. 767 (1994) 28
E.I. Dupont De Nemours & Co. v. *Davis*, 264 U.S. 456 (1924) 12, 42, 50
FTC v. *Bronson Partners, LLC*, 654 F.3d 359 (2d Cir. 2011) 16
FTC v. *Gem Merch. Corp.*, 87 F.3d 466 (11th Cir. 1996) 48
Gabelli v. *SEC*, 133 S. Ct. 1216 (2013) ..... *passim*
Hartford-Empire Co. v. *United States*, 323 U.S. 386 (1945) 19
Hecht Co. v. *Bowles*, 321 U.S. 321 (1944) 28
Holmberg v. *Armbrecht*, 327 U.S. 392 (1946) 42
Hudson v. *United States*, 522 U.S. 93 (1997) 28
Huntington v. *Attrill*, 146 U.S. 657 (1892) 15
Johnson v. *SEC*, 87 F.3d 484 (D.C. Cir. 1996) 17, 44
Kansas v. *Nebraska*, 135 S. Ct. 1042 (2015) 18
Keene Corp. v. *United States*, 508 U.S. 200 (1993) 4
Kelly v. *Robinson*, 479 U.S. 36 (1986) 25, 26, 32
Landsberg, In re, 14 F. Cas. 1065 (E.D. Mich. 1870) 4, 14, 15

Cases—Continued: Page

Life & Cas. Ins. Co. of Tenn. v. *McCray*, 291 U.S. 566 (1934) 14
Luis v. *United States*, 136 S. Ct. 1083 (2016) 42
Louisville Joint Stock Land Bank v. *Radford*, 295 U.S. 555 (1935) 19
Martin v. *United States SEC*, 734 F.3d 169 (2d Cir. 2013) 22
McDonnell v. *United States*, 136 S. Ct. 2355 (2016) 34
Meeker v. *Lehigh Valley R.R.*, 236 U.S. 412 (1915) 10, 11, 14, 27, 33
Mitchell v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960) 18
O'Sullivan v. *Felix*, 233 U.S. 318 (1914) 14
Occidental Life Ins. Co. v. *EEOC*, 432 U.S. 355 (1977) 43
Official Comm. of Unsecured Creditors of World-Com, Inc. v. *SEC*, 467 F.3d 73 (2d Cir. 2006) 23
Order of R.R. Telegraphers v. *Railway Express Agency*, 321 U.S. 342 (1944) 46
Pasquantino v. *United States*, 544 U.S. 349 (2005) 32
Peisch v. *Ware*, 8 U.S. (4 Cranch) 347 (1808) 34
Petrella v. *Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014) 45
Porter v. *Warner Holding Co.*, 328 U.S. 395 (1946) 2, 18, 26, 27, 41
Priebe & Sons, Inc. v. *United States*, 332 U.S. 407 (1947) 28
Riordan v. *SEC*, 627 F.3d 1230 (D.C. Cir. 2010) 44
SEC v. *Amerindo Inv. Advisors*, 639 Fed. Appx. 752 (2d Cir.), cert. denied, 136 S. Ct. 2429 (2016) 19
SEC v. *Bhagat*, No. C 01-21073, 2008 WL 4890890 (N.D. Cal. Nov. 12, 2008) 20

Cases—Continued: Page

SEC v. *Blatt*, 583 F.2d 1325 (5th Cir. 1978) 19
SEC v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963) 5
SEC v. *Cavanagh*, 445 F.3d 105 (2d Cir. 2006) 16, 18
SEC v. *Commonwealth Chem. Sec., Inc.*, 574 F.2d 90 (2d Cir. 1978) 2, 16, 17, 2
SEC v. *Crawford*, No. 11-cv-3656 (D. Minn.) (filed Dec. 21, 2011) 46
SEC v. *Custable*, 796 F.3d 653 (7th Cir. 2015) 20
SEC v. *First City Fin. Corp.*, 890 F.2d 1215 (D.C. Cir. 1989) 22, 30
SEC v. *Fischbach Corp.*, 133 F.3d 170 (2d Cir. 1997) 19, 20
SEC v. *Graham*:
21 F. Supp. 3d 1300 (S.D. Fla. 2014), aff'd in part, rev'd in part, and remanded, 823 F.3d 1357 (11th Cir. 2016) 48
823 F.3d 1357 (11th Cir. 2016) 43
SEC v. *Leslie*, No. C 07-3444, 2010 WL 2991038 (N.D. Cal. July 29, 2010) 17
SEC v. *Lorin*, 869 F. Supp. 1117 (S.D.N.Y. 1994) 22, 30
SEC v. *Lund*, 570 F. Supp. 1397 (C.D. Cal. 1983) 19
SEC v. *Manor Nursing Cntrs., Inc.*, 458 F.2d 1082 (2d Cir. 1972) 30
SEC v. *Mantria Corp.*, No. 09-cv-2676, 2012 WL 3778286 (D. Colo. Aug. 30, 2012) 3
SEC v. *Moran*, No. 92-cv-5209, 2012 WL 19386 (S.D.N.Y. Jan. 3, 2012) 20
SEC v. *Palmisano*, 135 F.3d 860 (2d Cir.), cert. denied, 525 U.S. 1023 (1998) 21
SEC v. *Rind*, 991 F.2d 1486 (9th Cir.), cert. denied, 510 U.S. 963 (1993) 42, 43, 44, 45

Cases—Continued: Page

SEC v. *Tambone*, 550 F.3d 106 (2008), reh'g en banc granted and opinion withdrawn, 573 F.3d 54 (2009), reinstated in relevant part, 597 F.3d 436 (1st Cir. 2010) 44
SEC v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301 (2d Cir.), cert. denied, 404 U.S. 1005 (1971) 22, 47
SEC v. *Wyly*:
950 F. Supp. 2d 547 (S.D.N.Y. 2013) 47
56 F. Supp. 3d 394 (S.D.N.Y. 2014) 43
117 F. Supp. 3d 381 (S.D.N.Y. 2015) 48
Salman v. *United States*, 137 S. Ct. 420 (2016) 29
Schine Chain Theatres, Inc. v. *United States*, 334 U.S. 110 (1948) 17, 18
Sheldon v. *Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940) 15, 18
Solem v. *Helm*, 463 U.S. 277 (1983) 28
Stevens v. *Gladding*, 58 U.S. (17 How.) 447 (1855) 19, 37
Taylor v. *United States*, 44 U.S. (3 How.) 197 (1845) 36
Telsey, In re, 144 B.R. 563 (Bankr. S.D. Fla. 1992) 30
3M Co. v. *Browner*, 17 F.3d 1453 (D.C. Cir. 1994) 4
Tull v. *United States*, 481 U.S. 412 (1987) 24
United States v. *92 Buena Vista Ave.*, 507 U.S. 111 (1993) 35, 40
United States v. *Bajakajian*, 524 U.S. 321 (1998) 35, 36, 40
United States v. *Chouteau*, 102 U.S. 603 (1881) 15
United States v. *Crescent Amusement Co.*, 323 U.S. 173 (1944) 18
United States v. *Hoar*, 26 F. Cas. (D. Mass. 1821) 29
United States v. *Mann*, 26 F. Cas. 1153 (C.C.D.N.H. 1812) (No. 15,718) 32, 35, 36

Cases—Continued: Page

United States v. *Maillard*, 26 F. Cas. 1140 (S.D.N.Y. 1871) 4
United States v. *Mayo*, 26 F. Cas. 1230 (C.C.D. Mass. 1813) 50
United States v. *Reisinger*, 128 U.S. 398 (1888) 15, 33
United States v. *Rodgers*, 466 U.S. 475 (1984) 41
United States v. *Telluride Co.*, 146 F.3d 1241 (10th Cir. 1998) 41
United States v. *Thompson*, 98 U.S. 486 (1879) 29
United States v. *Universal Mgmt. Servs., Inc.*, 191 F.3d 750 (6th Cir. 1999), cert. denied, 530 U.S. 1274 (2000) 48
United States v. *Ursery*, 518 U.S. 267 (1996) 28, 36
United States v. *Whited & Wheless, Ltd.*, 246 U.S. 552 (1918) 47
United States ex rel. Marcus v. *Hess*, 317 U.S. 537 (1943) 38
United States SEC v. *Quan*, 817 F.3d 584 (8th Cir. 2016) 19, 22
Zacharias v. *SEC*, 569 F.3d 458 (D.C. Cir. 2009) 16, 30

Constitution, statutes and regulations:

U.S. Const.:
Amend. V, Double Jeopardy Clause 36
Amend. VIII, Excessive Fines Clause 36
Act of Apr. 30, 1790, ch. 9, § 32, 1 Stat. 119 4
Act of Mar. 2, 1799, ch. 22, § 89, 1 Stat. 695 4
Act of Mar. 26, 1804, ch. 40, § 3, 2 Stat. 290 4
Act of Mar. 1, 1823, ch. 21, § 35, 3 Stat. 739 3
Act of Feb. 28, 1839, ch. 36, § 4, 5 Stat. 322 3

Statutes and regulations—Continued: Page

Bankruptcy Code, 11 U.S.C. 101 *et seq.*:
Ch. 5, 11 U.S.C. 523(a)(7) 25, 30
Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, § 5(b)(2), 102 Stat. 4681 (15 U.S.C. 78t-1(b)(2)) 44, 19a
Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, § 2, 98 Stat. 1264 23
Investment Advisers Act of 1940, 15 U.S.C. 80b-1 *et seq.* 2
15 U.S.C. 80b-3(k)(5) 2
15 U.S.C. 80b-5(a) 6
15 U.S.C. 80b-9(d) 2
Investment Company Act of 1940, 15 U.S.C. 80a-1 *et seq.* 2
15 U.S.C. 80a-9(e) 24
15 U.S.C. 80a-41(d) 2
Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 103(b)(2), 109 Stat. 756 (15 U.S.C. 78u(d)(4)) 44, 8a
Rev. Stat. § 1047 (1874) 4
Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745:
§ 305(b), 116 Stat. 779 (15 U.S.C. 78u(d)(5)) 3, 24
§ 308, 116 Stat. 784 (15 U.S.C. 7246) 20, 24, 17a
§ 308(a), 116 Stat. 784 (15 U.S.C. 7246(a)) 21, 27, 17a
§ 308(c)(1), 116 Stat. 785 (15 U.S.C. 7246(c)(1)) 3, 45, 18a
§ 803(3) 116 Stat. 801 (11 U.S.C. 523(a)(19)) 31
Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 ..... 2, 23

Statutes and regulations—Continued: Page

Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.* 2
15 U.S.C. 78t-1(b)(2) 3, 19a
15 U.S.C. 78u 23, 24, 1a
15 U.S.C. 78u(d)(1) 2, 3, 18, 41, 4a
15 U.S.C. 78u(d)(3) 17, 23, 24, 5a
15 U.S.C. 78u(d)(4) 3, 8a
15 U.S.C. 78u(d)(5) 18, 24, 41, 8a
15 U.S.C. 78u-1(d)(5) 3, 45
15 U.S.C. 78u-3(e) 2
15 U.S.C. 78u-6(b)(1) 24, 25
Tax Reform Act of 1969, Pub. L. No. 91-172, Tit. IX, § 902(a), 83 Stat. 710 (26 U.S.C. 162(f)) 31
Wall Street Transparency and Accountability Act of 2010, Pub. L. No. 111-203, Tit. VII, § 744, 124 Stat. 1735 (7 U.S.C. 13a-1(d)(3)) 24
15 U.S.C. 77h-1(e) 2
18 U.S.C. 981(a)(1)(C) 39
18 U.S.C. 981(d) 46
18 U.S.C. 1963(a)(3) 39
18 U.S.C. 3282 41
19 U.S.C. 1621 40
26 U.S.C. 6110 31
28 U.S.C. 791 (1926) 4
28 U.S.C. 791 (1940) 4
28 U.S.C. 1658 (Supp. II 1990) 43
28 U.S.C. 1658(b) 45
28 U.S.C. 2461 37
28 U.S.C. 2462 ..... *passim*, 1a

Regulations—Continued: Page

17 C.F.R.:
Section 201.1100 21
Section 201.1102 22

Miscellaneous:

Jeremy Bentham, *The Rationale of Punishment* (1830) 42
Black's Law Dictionary (1st ed. 1891) 14, 32, 33, 36
2 *Bouvier's Law Dictionary* (1852) 15
2 *Burrill's Law Dictionary* (1871) 15
Stefan D. Cassella, *Asset Forfeiture Law in the United States* (2d ed. 2013) 40
Steven R. Glaser, *Statutes of Limitations for Equitable and Remedial Relief in SEC Enforcement Actions*, 4 Harv. Bus. L. Rev. 129 (2014) 42
J. Gould & G. Tucker, *Notes on the Revised Statutes of the United States and the Subsequent Legislation of Congress* (1889) 15
6 Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* (6th ed. Supp. 2015) 16
H.R. Rep. No. 308, 80th Cong., 1st Sess. (1947) 4, 37
H.R. Rep. No. 355, 98th Cong, 1st Sess. (1983) 23
H.R. Rep. No. 616, 101st Cong., 2d Sess. (1990) 2, 23, 45
Samuel Johnson et al., *Johnson's English Dictionary* (1834) 33
Mitchell A. Lowenthal et al., Special Project, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 Cornell L. Rev. 1011 (1980) 44
Catherine E. Maxson, Note, *The Applicability of Section 2462's Statute of Limitations to SEC Enforcement Suits In Light of the Remedies Act of 1990*, 94 Mich. L. Rev. 512 (1995) 42

Miscellaneous—Continued: Page

Thomas D. Moffitt, Office of Chief Counsel, IRS, Memorandum No. 201619008, at 1 (Jan. 29, 2016), https://www.irs.gov/pub/irs-wd/201619008.pdf 31

60 N.Y. Jur. 2d *Forfeitures and Penalties* (2d ed. 2016) 38

Note, *Developments in the Law—Statutes of Limitations*, 63 Harv. L. Rev. 1177 (1950) 15

Press Release, U.S. SEC, *VimpelCom to Pay $795 million in Global Settlement for FCPA Violations* (Feb. 18, 2016), www.sec.gov/news/pressrelease/2016-34.html (last visited Mar. 26, 2017) 21

2 Restatement (Third) of Restitution and Unjust Enrichment (2011) 16

S. Rep. No. 205, 107th Cong., 2d Sess. (2002) 24

S. Rep. No. 337, 101st Cong., 2d Sess. (1990) 23

SEC, *Select SEC and Market Data* (2005-2016), https://www.sec.gov/reports (last visited Mar. 26, 2017) 46

Walter Scott, *Lay of the Last Minstrel*, Canto VI (5th ed. 1806) 38

3 St. George Tucker, *Blackstone's Commentaries: with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* (1803) 33

U.S. SEC, *FY 2015 Annual Performance Report & FY 2017 Annual Performance Plan*, https://www.sec.gov/about/reports/sec-fy2015-fy2017-annual-performance.pdf (last visited Mar. 26, 2017) 46

Miscellaneous—Continued: Page

Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 Stan. L. Rev. 331 (2015) 20

Noah Webster, *An American Dictionary of the English Language* (1828):

Vol. 1 37

Vol. 2 15

In the Supreme Court of the United States

No. 16-529

CHARLES R. KOKESH, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 834 F.3d 1158. The opinion of the district court (Pet. App. 20a-47a) is not published in the *Federal Supplement* but is available at 2015 WL 11142470.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2016. The petition for a writ of certiorari was filed on October 18, 2016, and was granted on January 13, 2017. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-21a.

STATEMENT

1. a. Congress has authorized the Securities and Exchange Commission (SEC or Commission) to bring civil enforcement actions seeking injunctive relief for violations of (*inter alia*) the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78a *et seq.*, the Investment Advisers Act of 1940 (Advisers Act), 15 U.S.C. 80b-1 *et seq.*, and the Investment Company Act of 1940 (Investment Company Act), 15 U.S.C. 80a-1 *et seq.* See 15 U.S.C. 78u(d)(1); 15 U.S.C. 80b-9(d); 15 U.S.C. 80a-41(d). For decades, district courts have ordered defendants in such actions to "disgorge" the amount of profits "acquired in violation" of the securities laws. *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398-399 (1946); see, *e.g.*, *SEC* v. *Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 95, 102-103 (2d Cir. 1978) (Friendly, J.).

In 1990, Congress authorized the Commission to seek civil monetary penalties in such actions. See H.R. Rep. No. 616, 101st Cong., 2d Sess. 13 (1990) (1990 House Report). Congress provided for several tiers of penalties, depending on the nature of the wrongdoing and the losses it caused. See Securities Enforcement Remedies and Penny Stock Reform Act of 1990 (Enforcement Remedies Act), Pub. L. No. 101-429, 104 Stat. 931. Congress also authorized the Commission to order "accounting and disgorgement" in administrative proceedings. See 15 U.S.C. 77h-1(e), 78u-3(e), 80b-3(k)(5).

In 2002, Congress provided that, "[i]n any action or proceeding brought or instituted by the Commission under any provision of the securities laws, * * * any Federal court may grant[] any equitable relief that may be appropriate or necessary for the benefit of

investors." Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 305(b), 116 Stat. 779; see 15 U.S.C. 78u(d)(5). District courts rely on that provision in ordering disgorgement, see, *e.g.*, *SEC* v. *Mantria Corp.*, No. 09-cv-02676, 2012 WL 3778286, at *1 (D. Colo. Aug. 30, 2012); see also 15 U.S.C. 78u(d)(1), a remedy that Congress has referenced in a number of enactments, see, *e.g.*, 15 U.S.C. 78u(d)(4), 78t-1(b)(2), 7246(c)(1).

b. Congress has not specified a statute of limitations for SEC actions alleging a violation of the Exchange Act, the Advisers Act, or the Investment Company Act (except with respect to actions seeking civil penalties for insider trading, see 15 U.S.C. 78u-1(d)(5)). A general statute of limitations, 28 U.S.C. 2462, however, governs "penalty provisions throughout the U.S. Code." *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1219 (2013).

The "origins" of Section 2462 "date back to at least 1839." *Gabelli*, 133 S. Ct. at 1219. In that year, Congress enacted a provision stating that "no suit or prosecution shall be maintained, for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, unless the same suit or prosecution shall be commenced within five years from the time when the penalty or forfeiture accrued," provided that "[t]he person of the offender or the property liable for such penalty or forfeiture" was within the United States during that period. Act of Feb. 28, 1839, ch. 36, § 4, 5 Stat. 322.[1] That provision

---

[1] Congress had previously enacted provisions placing time limits on suits for penalties or forfeitures, but those provisions differ from the 1839 enactment in wording or scope (or both), and sometimes conflicted with each other. See Act of Mar. 1, 1823, ch. 21,

was carried forward, with minor changes, in the Revised Statutes enacted in 1874, see Rev. Stat. § 1047, 18 Stat. 193, and in a 1926 codification, see 28 U.S.C. 791 (1926); see also 28 U.S.C. 791 (1940).

In 1948, when Congress comprehensively revised the judicial code, Section 2462 "took on its current form." *Gabelli*, 133 S. Ct. at 1219. The 1948 reviser's note explained that the provision was "[b]ased on * * * R.S. 1047[]. Changes were made in phraseology." H.R. Rep. No. 308, 80th Cong., 1st Sess. A191 (1947) (1947 House Report); see *Keene Corp.* v. *United States*, 508 U.S. 200, 209 (1993) (Court "do[es] not presume that the [1948] revision worked a change in the underlying substantive law unless an intent to make such a change is clearly expressed") (brackets, citation, and internal quotation marks omitted). As then revised, and today, the provision states:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

28 U.S.C. 2462.

---

§ 35, 3 Stat. 739; Act of Mar. 26, 1804, ch. 40, § 3, 2 Stat. 290; Act of Mar. 2, 1799, ch. 22, § 89, 1 Stat. 695; Act of Apr. 30, 1790, ch. 9, § 32, 1 Stat. 119; see also *3M Co.* v. *Browner*, 17 F.3d 1453, 1458 n.7 (D.C. Cir. 1994) ("ancestor of the Act of 1839" is "unclear"); *United States* v. *Maillard*, 26 F. Cas. 1140, 1141-1142 (S.D.N.Y. 1871) (discussing conflict between early provisions); *In re Landsberg*, 14 F. Cas. 1065, 1066-1067 (E.D. Mich. 1870).

In *Gabelli*, this Court considered the applicability of Section 2462 in an SEC action involving civil monetary penalties, which "go beyond compensation, are intended to punish, and label defendants wrongdoers." 133 S. Ct. at 1223; see *id.* at 1224. The Court held that the five-year period for seeking civil penalties began to run when the defendant's allegedly fraudulent conduct occurred, not when the government knew or should have known of the violation. *Id.* at 1220-1224. The Court further noted that "[t]he SEC also sought injunctive relief and disgorgement, claims the District Court found timely on the ground that they were not subject to [Section] 2462." *Id.* at 1220 n.1. The Court explained that "[t]hose issues are not before us." *Ibid.*

2. Petitioner owned and controlled two Commission-registered investment advisers (collectively, the Advisers). See Pet. App. 3a. The Advisers conducted the day-to-day operations of four business development companies (collectively, the Funds) that "raised money from" tens of thousands of small investors "through public securities offerings" and invested it in "private start-up companies." *Id.* at 2a-3a; see D. Ct. Doc. 162, at 73, 111 (Nov. 11, 2014) (investors were limited partners in the Funds). The Advisers owed the Funds a fiduciary duty "of utmost good faith[] and full and fair disclosure." *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963) (citations omitted).

Each Fund had a contract with the Advisers, signed (and largely written) by petitioner. See Pet. App. 3a; see also D. Ct. Doc. 162, at 74-75. The contracts prescribed how the Advisers would be compensated, barred certain kinds of reimbursements, and "prohibited any payments to the Advisers that were

not expressly specified." Pet. App. 3a-4a. Those restrictions were consistent with the Advisers Act, which places limits on compensating advisers "on the basis of a share of capital gains." 15 U.S.C. 80b-5(a); see Pet. App. 3a.

Beginning in 1995, and continuing through 2006, petitioner misappropriated $34.9 million from the Funds, either keeping that money himself or directing it to cover Advisers-related expenses that he otherwise would have had to pay. See Pet. App. 3a, 5a. From 1995 through 2006, petitioner directed the Advisers' treasurer to take $23.8 million from the Funds to reimburse the Advisers for salaries and bonuses paid to the Advisers' officers (including petitioner). See *id.* at 3a. During the same period, he directed the treasurer to take $5 million from the Funds to make reimbursements for the Advisers' office rent. See *ibid.* And in 2000, he "caused the Advisers to take $6.1 million" from the Funds—an amount that petitioner told the SEC was for "tax distributions" but that largely went directly to petitioner (even though he paid "only $10,304 in federal taxes that year"). *Id.* at 3a-4a.

Those payments "violated the contracts between the Advisers and the Funds" and exceeded the statutory limitations on compensation for investment advisers. Pet. App. 4a. They also drained money from investors. For instance, while petitioner paid himself and a fellow officer $8.4 million in total bonuses between 2000 and 2005, the Funds lost money in all but one of those years, for total losses of $85 million. See C.A. Record on Appeal (ROA) 1542-1544; SEC Trial Ex. 396.

Petitioner took various steps to conceal the illicit payments. See Pet. App. 4a; *id.* at 22a-24a. For example, he misstated the salary and bonus payments in false proxy statements distributed to investors, hid payments from the Funds' directors, and caused the filing of dozens of false reports with the Commission through 2007. See *id.* at 22a-24a. Because information about the flow of money from the Funds was available to very few people, see C.A. ROA 1238-1239, 1544, petitioner was able to hide his wrongdoing for a lengthy period.

3. a. In 2009, the SEC brought this civil enforcement action against petitioner, alleging violations of the Exchange Act, the Advisers Act, and the Investment Company Act. See Pet. App. 1a-2a; SEC C.A. Br. 7-8. The evidence at trial established that petitioner had controlled all aspects of the Advisers' business and the Funds' accounts. It also established that he had knowingly engaged in fraud, and had concealed that fraud, in order to benefit himself and to keep up appearances at the Advisers, harming large numbers of small investors in the process. See, *e.g.*, D. Ct. Doc. 162, at 56-63, 73-83, 99-100, 112-118. Petitioner used his illicit gains to maintain an extravagant lifestyle, including by purchasing a gated mansion, buying and renovating a private polo ground, and keeping a personal stable of more than 50 horses. See *id.* at 26, 66-71, 117-118.

The jury found violations of all three statutes. The jury determined that petitioner had "knowingly and willfully converted the Funds' assets to his own use or to the use of another," and that he had "knowingly and substantially assisted the Advisers in defrauding the Funds, in filing false and misleading reports with the

SEC, and in soliciting proxies using false and misleading proxy statements." Pet. App. 4a-5a.

b. The SEC sought entry of final judgment ordering petitioner to "disgorge the amounts that [he] misappropriated in violation of [the] securities laws." Pet. App. 24a. The district court ordered petitioner to "disgorge" $34,927,329, plus prejudgment interest. *Id.* at 46a-47a. The court rejected petitioner's argument that the disgorgement remedy constituted a "penalty" covered by Section 2462. The court explained that disgorgement covered only "ill-gotten gains earned by the defendant while in violation of securities laws," *id.* at 41a (citation omitted), and that such a remedy is "remedial" and "equitable" rather than punitive, *id.* at 42a; see *id.* at 43a-45a.

The district court also enjoined petitioner from violating specific provisions of the securities laws and ordered him to pay a civil monetary penalty for conduct within Section 2462's five-year limitations period. See Pet. App. 24a-32a, 36a-40a, 45a-47a. The court found petitioner's actions to be "egregious," noting that he had caused "substantial losses to investors" through a "vast" fraud with a "high degree of scienter," had used the proceeds to live "an extravagant lifestyle," had "specifically targeted smaller investors * * * because they would be less likely to sue if they discovered his schemes," and had shown no remorse. *Id.* at 30a-31a, 39a. The court imposed a "third-tier" penalty of $2,354,593, reflecting the fact that petitioner's offense had involved fraud and caused serious harm. *Id.* at 45a.

c. On appeal, petitioner contended that Section 2462's five-year statute of limitations barred the dis-

gorgement order. The Tenth Circuit rejected that argument. See Pet. App. 10a-17a.

First, the court of appeals held that disgorgement is not a "penalty." Pet. App. 10a-13a. The court explained that "the disgorgement remedy does not inflict punishment," but "leaves the wrongdoer in the position he would have occupied had there been no misconduct." *Id.* at 11a (citation and internal quotation marks omitted). While recognizing that "disgorgement serves a deterrent purpose," the court observed that "it does so only by depriving the wrongdoer of the benefits of wrongdoing." *Ibid.*; see *id.* at 12a.

Second, the court of appeals held that disgorgement is not a "forfeiture." Pet. App. 13a-17a. The court stated that, "[w]hen the term *forfeiture* is linked in [Section] 2462 to the undoubtedly punitive actions for a *civil fine* or *penalty*, it seems apparent that Congress was contemplating the meaning of *forfeiture* in [a] historical sense." *Id.* at 15a. As used in that sense, the court explained, "forfeiture" referred to an in rem procedure to seize property without regard to whether the owner was "innocent" or whether "the value of the property" had any "relation to any loss to others or gain to the owner." *Id.* at 14a. The court concluded that "[t]he nonpunitive remedy of disgorgement does not fit in that company," particularly given that any ambiguity in Section 2462 must be resolved "in the government's favor to avoid a limitations bar." *Id.* at 15a, 16a.

SUMMARY OF ARGUMENT

This Court has already construed the terms "penalty" and "forfeiture" as those words are used in Section 2462: "The words 'penalty or forfeiture' in this section

refer to something imposed in a punitive way for an infraction of a public law." *Meeker* v. *Lehigh Valley R.R.*, 236 U.S. 412, 423 (1915) (interpreting predecessor to Section 2462); see *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1223 (2013). The disgorgement remedy in SEC actions is not punitive, and Section 2462 therefore does not apply to it.

A. Disgorgement in SEC actions is not a "penalty" under Section 2462 because it is not a punishment. Penalties can be imposed regardless of whether a defendant realizes a financial benefit from a violation of law. They can and usually do deprive the defendant of money to which he has a lawful entitlement, thus leaving him worse off than he would have been if he had committed no violation. The equitable remedy of disgorgement, by contrast, simply prevents unjust enrichment by forcing a defendant to give up funds that he acquired unlawfully, thereby placing him in the same position that he would have occupied but for the securities-law violation. Disgorgement is thus analogous to restitution and to the divestiture remedy in an antitrust case, neither of which is a penalty. And while a remedy need not be compensatory in order to avoid being penal, disgorgement in SEC actions is often compensatory, and thus unambiguously non-punitive, because district courts frequently return disgorged funds to injured investors. In enacting various civil-penalty provisions over the last few decades against the backdrop of the well-established disgorgement remedy, Congress has demonstrated its understanding that disgorgement is not itself a penalty.

B. Disgorgement in SEC actions also is not a Section 2462 "forfeiture." Like "penalty," the word "for-

feiture" in Section 2462 refers to something punitive. See *Meeker*, 236 U.S. at 423. That is particularly apparent given the other terms on the list of remedies to which Section 2462 applies, since those additional remedies ("civil fine" and "penalty") are both punitive measures. Accordingly, for all of the same reasons that disgorgement is not a "penalty" under Section 2462, disgorgement likewise is not a Section 2462 "forfeiture."

Neither the 1839 Congress nor the 1948 Congress that enacted the current version of the statute-of-limitation provision would have envisioned that "forfeiture" could cover a personal judgment for disgorgement of ill-gotten gains. Petitioner has not identified any form of historical forfeiture that resembled the disgorgement remedy in an SEC action. At the relevant points in time, "forfeiture" would have been understood to refer either to *in rem* forfeiture, directed at property that was contraband or the instrumentality of a crime, or to a fine. Disgorgement is fundamentally different from both those remedies. It was not until the 1970s that existing forfeiture provisions were expanded to allow for *in personam* criminal forfeiture and to cover criminal "proceeds." Congress's more expansive use of the term "forfeiture" in statutes that long postdate Section 2462 has no meaningful bearing on the proper interpretation of that statute or its predecessors.

C. Extending Section 2462 to cover disgorgement in SEC actions would be inconsistent with the purposes of statutes of limitations and would have harmful consequences. Although penalties are virtually always subject to time limits, government suits involving other kinds of relief may be unrestricted by any time

bar. Rather, in determining whether the equitable remedy of disgorgement is appropriate in particular cases, courts may take into account the passage of time, along with other facts and circumstances. That has been the status quo with respect to disgorgement for nearly half a century.

During that period, Congress has mentioned disgorgement approvingly in statutory enactments, and it has imposed time limits on particular government and private securities actions without ever placing such restrictions on disgorgement. Petitioner fails to identify any abuses resulting from that state of affairs, and the SEC has strong incentives to bring suit as quickly as possible notwithstanding the inapplicability of Section 2462 to claims for disgorgement. Applying Section 2462 to disgorgement would not spare wrongdoers from having to defend themselves in SEC enforcement actions, since the SEC could continue to sue without any time restriction to obtain remedial injunctions, or could sue within five years after the end of the wrongdoing for at least some amount of disgorgement (and civil penalties). That interpretation of the statute would simply allow defendants like petitioner to keep all or a substantial portion of the money that they stole from investors, thus increasing the financial incentives to violate the law and to hide any violations from authorities.

D. This Court has often applied the interpretive canon that "[s]tatutes of limitation sought to be applied to bar rights of the Government, must receive a strict construction in favor of the Government." *E.I. Dupont De Nemours & Co.* v. *Davis*, 264 U.S. 456, 462 (1924). That narrow-construction rule reinforces the conclusion that claims for disgorgement are not sub-

ject to Section 2462's five-year limit. At the least, neither "penalty" nor "forfeiture" clearly encompasses a remedy that, like disgorgement, is not "intended to punish," *Gabelli*, 133 S. Ct. at 1223, but simply prevents a defendant from retaining money acquired through a violation of the law for which he has been found liable. The narrow-construction canon—which rests on the principle that the sovereign is subject only to a statute of limitations to which it clearly consents—is therefore a sufficient basis to conclude that disgorgement in an SEC action falls outside the scope of the "penalt[ies]" and "forfeiture[s]" that Section 2462 covers.

ARGUMENT

Section 2462 cannot be reasonably read to encompass all forms of monetary relief ordered by a court in a government action. For instance, as petitioner concedes (*e.g.*, Br. 28-32), Section 2462 does not cover a compensatory damages award. The government therefore would have unlimited time under that provision (in the absence of some other applicable statute of limitations) to sue for compensatory damages for itself or on behalf of some private party. The omission of such damages from the specific list of remedies set forth in Section 2462—"civil fine, penalty, or forfeiture"—highlights the fact that Congress used those terms to refer to discrete, historically defined categories, and not as a way of capturing any kind of order requiring the payment of money that a court might issue in a suit in which the government is the plaintiff. Petitioner has not contended that the disgorgement remedy in SEC actions is a "fine." The only question, then, is whether the remedy is a "penalty" or a "forfeiture" as Congress would have understood those terms

at the relevant point in time. The disgorgement remedy does not fall into either category.

A. Disgorgement Is Not A "Penalty" Under Section 2462

1. As Used In Section 2462, A "Penalty" Is A Punishment

The word "penalty" is "a term of varying and uncertain meaning." *Life & Cas. Ins. Co. of Tenn.* v. *McCray*, 291 U.S. 566, 574-575 (1934); see *Black's Law Dictionary* 883-884 (1st ed. 1891) ("The terms 'fine,' 'forfeiture,' and 'penalty' are often used loosely, and even confusedly.") (citation omitted). As used in Section 2462, however, this Court has construed the word "penalty" to mean a punishment—"something imposed in a punitive way for an infraction of a public law." *Meeker* v. *Lehigh Valley R.R.*, 236 U.S. 412, 423 (1915) (interpreting predecessor to Section 2462); see *ibid.* ("strictly remedial" order is not punitive); see also *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1223 (2013) (stating that, under Section 2462, "penalties * * * go beyond compensation, are intended to punish, and label defendants wrongdoers"); *O'Sullivan* v. *Felix*, 233 U.S. 318, 324 (1914) (interpreting predecessor to Section 2462 and stating that "'penalty' involves the idea of punishment for the infraction of the law, and is commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered").

That interpretation is consistent with nineteenth-century understandings of the term. In *In re Landsberg*, 14 F. Cas. 1065 (E.D. Mich. 1870), the court construed the term "penalty" in the 1839 predecessor to Section 2462 to mean a "fixed pecuniary mulct in-

curred by the violation of some law." *Id.* at 1067; see J. Gould & G. Tucker, *Notes on the Revised Statutes of the United States and the Subsequent Legislation of Congress* 350 (1889) (relying on *Landsberg* to define "penalty" as used in the 1874 predecessor to Section 2462); see also, *e.g.*, *United States* v. *Reisinger*, 128 U.S. 398, 402 (1888) ("the words 'penalty,' 'liability,' and 'forfeiture' * * * have been used by the great masters of crown law and the elementary writers as synonymous with the word 'punishment'"); *Huntington* v. *Attrill*, 146 U.S. 657, 666-667 (1892) (stating that "[s]trictly and primarily," the words "penal" and "penalty" mean "punishment, whether corporal or pecuniary") (citing, *inter alia*, *United States* v. *Chouteau*, 102 U.S. 603 (1881)). Dictionaries from the relevant period reflect the same understanding. See, *e.g.*, 2 *Burrill's Law Dictionary* 286 (1871) ("A punishment; a punishment imposed by statute as a consequence of the commission of a certain specified offense."); 2 *Bouvier's Law Dictionary* 324 (1852) ("By penalty is understood, also, the punishment inflicted by law for its violation."); 2 Noah Webster, *An American Dictionary of the English Language* 32 (1828) (*Webster's Dictionary*) (defining "penalty" as "[t]he suffering in person or property which is annexed by law or judicial decision to the commission of a crime, offense or trespass, as a punishment") (cited in Pet. Br. 24).[2]

---

[2] The accepted understanding of "penalty" was the same when Section 2462 was enacted in 1948. See, *e.g.*, *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 399-400 (1940) ("penalty" in copyright-infringement case would "giv[e] to the copyright proprietor profits which are not attributable to the infringement"); see also generally Note, *Developments in the Law—Statutes of Limi-*

2. Disgorgement In SEC Actions Is Not A "Penalty"

Under that approach, disgorgement of an amount obtained through violation of the securities laws is not a "penalty." Penalties can and typically do deprive defendants of money to which they are lawfully entitled, thereby punishing them by rendering them worse off financially than they would have been if they had committed no violation. Disgorgement, by contrast, simply prevents unjust enrichment by forcing a defendant to divest funds that he acquired unlawfully.

a. Disgorgement deprives the defendant of the benefit of his wrongdoing, thus returning him to the position he would have occupied absent the illegal conduct. From the defendant's perspective, disgorgement "restore[s] the status quo," *Gabelli*, 133 S. Ct. at 1223 (citation omitted), by taking away the amounts by which he was unjustly enriched. See *SEC* v. *Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 95 (2d Cir. 1978); see also, *e.g.*, *SEC* v. *Cavanagh*, 445 F.3d 105 (2d Cir. 2006); *FTC* v. *Bronson Partners, LLC*, 654 F.3d 359 (2d Cir. 2011). But it does not deprive the defendant of anything he was rightfully entitled to in the first place, and it is not divorced from the damage to society from the defendant's bad acts. It therefore does not punish. See *Zacharias* v. *SEC*, 569 F.3d 458, 471-473 (D.C. Cir. 2009); see also 6 Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* § 16.2[2][D][1], at 64 (6th ed. Supp. 2015) ("[r]emedies as disgorgement and restitution are not punitive"); cf. 2 Restatement (Third) of Restitution and Unjust Enrichment § 51 cmt. (*k*), at 222 (2011) ("Disgorgement

---

tations, 63 Harv. L. Rev. 1177, 1266 n.736 (1950) (Section 2462 "has received a narrow interpretation").

of wrongful gain is not a punitive remedy. While the remedy will be burdensome to the defendant in practice * * * [he] is ideally left in the position he would have occupied had there been no misconduct.").[3]

The non-punitive character of disgorgement is illustrated by the fact that disgorgement will sometimes be inappropriate even when a securities-law violation has been proved. A defendant can violate those laws without obtaining any money from his unlawful acts, in which case a disgorgement order would be impermissible. See, *e.g.*, *SEC* v. *Leslie*, No. C-07-3444, 2010 WL 2991038, at *39 (N.D. Cal. July 29, 2010). In contrast, a *punishment* for violating the law may be imposed regardless of whether the defendant profits. See, *e.g.*, 15 U.S.C. 78u(d)(3).

Disgorgement is instead remedial—intended to lessen the effects of a violation. It is analogous to restitution to an injured party, "by which [a] defendant is made to disgorge ill-gotten gains or to restore the status quo, or to accomplish both objectives." *Commonwealth*, 574 F.2d at 95 (citation omitted). It is also analogous to the divestiture remedy in an antitrust case, which requires a defendant to divest businesses that it has unlawfully acquired. See *Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. 110, 128 (1948) ("To require divestiture of theatres unlawfully acquired is not to add to the penalties that Congress has provided in the antitrust laws."). Divestiture of wrongfully acquired property "merely deprives

---

[3] The existence of a punishment must be determined objectively. A plainly remedial order—for instance, an award of damages that makes an injured party whole—may nevertheless be experienced by the defendant as costly or painful. See *Brady* v. *Daly*, 175 U.S. 148, 155 (1899); *Johnson* v. *SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996).

a defendant of the gains from his wrongful conduct," thus "undo[ing] what could have been prevented had the defendants not outdistanced the government in their unlawful project." *Ibid.*; see *California* v. *American Stores Co.*, 495 U.S. 271, 295 (1990); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 189 (1944); see also, *e.g.*, *Cavanagh*, 445 F.3d at 117-118 (analogizing to the remedy of accounting).

Consistent with disgorgement's remedial character, district courts in securities cases regularly order that relief in the exercise of their equitable powers. See 15 U.S.C. 78u(d)(1) and (5). "When Congress entrusts to an equity court the enforcement of [statutory] prohibitions," it invokes "the historic power of equity to provide complete relief." *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292 (1960). "[A]ct[ing] in the public interest by restoring the status quo" is "within the recognized power and within the highest tradition of a court of equity." *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 400, 402 (1946); see *Bell* v. *Hood*, 327 U.S. 678, 684 (1946). And when "the public interest is involved" in a suit brought by the government, the court's "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Mitchell*, 361 U.S. at 291 (quoting *Porter*, 328 U.S. 398).

As an equitable remedy, disgorgement is both discretionary and flexible. Cf. *Kansas* v. *Nebraska*, 135 S. Ct. 1042, 1058 (2015) (stating that "disgorgement need not be all or nothing" and that "flexibility is inherent in equitable remedies") (brackets and citation omitted); *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 399 (1940) (recovery of profits by injured parties is "appropriate equitable relief inci-

dent to a decree for an injunction," given "not to inflict punishment but to prevent an unjust enrichment"). See, *e.g.*, *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 435 (1945) ("relief in equity is remedial, not penal"); *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 579 (1935); *Stevens* v. *Gladding*, 58 U.S. (17 How.) 447, 452-455 (1855).

b. Contrary to petitioner's suggestion (*e.g.*, Br. 26-27), disgorgement often is used in an unambiguously compensatory manner. Although compensation is not the test for whether a remedy is non-punitive, and therefore not a penalty, see pp. 25-27, *infra*, a compensatory remedy is necessarily non-penal.

i. When the SEC successfully requests disgorgement in cases involving victimized investors, those funds generally are not paid directly to the Treasury. Rather, they are paid "to the district court, which has discretion over how to disburse them." *United States SEC* v. *Quan*, 817 F.3d 584, 594 (8th Cir. 2016). If feasible, the district court may distribute disgorged funds to a defendant's victims—and it is the Commission's "policy wherever possible * * * to recommend a distribution plan by which a defendant's unlawful gains are paid out to defrauded investors." *SEC* v. *Fischbach Corp.*, 133 F.3d 170, 174 (2d Cir. 1997) (citation and internal quotation marks omitted). The court may give a "receiver or trustee * * * the task of locating those members of the public who were injured by the illegal activity" and of "pay[ing] each injured party an amount determined by the trustee to be fair and equitable." *SEC* v. *Lund*, 570 F. Supp. 1397, 1404 (C.D. Cal. 1983); see, *e.g.*, *SEC* v. *Amerindo Inv. Advisors*, 639 Fed. Appx. 752, 755 (2d Cir.) (receiver), cert. denied, 136 S. Ct. 2429 (2016); *SEC* v.

Blatt, 583 F.2d 1325, 1335 n.30 (5th Cir. 1978) (trustee).

To be sure, cases arise in which returning money to victims would be infeasible and the district court therefore orders that the disgorged money be sent to the Treasury. That has happened in cases in which an attempted distribution to victims "would produce more waste than benefit," *SEC* v. *Bhagat*, No. C-01-21073, 2008 WL 4890890, at *2 (N.D. Cal. Nov. 12, 2008), such as when "the victims can't be located," *SEC* v. *Custable*, 796 F.3d 653, 656 (7th Cir. 2015); see, *e.g.*, *SEC* v. *Moran*, No. 92-civ.-5209, 2012 WL 19386, at *1 (S.D.N.Y. Jan. 3, 2012) (citing "relatively small sum at issue" and "diffuse nature of the underlying fraud"); see also *Fischbach*, 133 F.3d at 176 (distribution that would have been "windfall" to uninjured party was inappropriate). But district courts order distribution of disgorged funds to victims in a significant percentage of cases. One study—considering distributions of "fair funds" (which include civil penalties, see 15 U.S.C. 7246) but not accounting for distributions consisting solely of disgorgement—found that, between 2002 and 2013, courts distributed to defrauded investors nearly $9 billion in funds obtained by SEC enforcement actions, including nearly $3 billion in disgorgement, amounting to an "extensive and sustained effort by a public agency to compensate the victims of misconduct." Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 Stan. L. Rev. 331, 333-334, 352 (2015).[4]

---

[4] In addition, amounts are returned to injured investors through receiverships in SEC actions, see, *e.g.*, 01-cv-11282 Docket entry No. 283, *SEC* v. *Shiv* (S.D.N.Y. Mar. 24, 2009) (stating that portion

ii. Petitioner's contrary description of how disgorgement works is incorrect. First, petitioner states (Br. 26-27) that disgorgement amounts cannot be used to compensate victims unless a civil penalty is also collected. A so-called "fair fund" under the Sarbanes-Oxley Act of 2002, which authorizes distribution of civil penalties to injured investors, is created for a particular case only if a civil penalty is awarded. See 15 U.S.C. 7246(a). But district courts can and do distribute disgorged money to victims, just as they did before 2002, even when no civil penalty is awarded and no "fair fund" exists. See, *e.g.*, 99-cv-289 Docket entry No. 31, *SEC* v. *Lu* (N.D. Cal. Dec. 8, 2005); 07-cv-537 Docket entry No. 39, *SEC* v. *Longs* (E.D. Ark. 2009). Petitioner's description rests on his misreading of a regulation that relates only to "fair funds" and applies only in administrative proceedings. See 17 C.F.R. 201.1100.

Second, petitioner argues (Pet. 27) that "[i]n all cases * * * the SEC has discretion not to compensate victims when it deems compensation infeasible."

---

of disgorgement order was "satisfied" by receiver's distribution of assets), and through parallel criminal proceedings, see, *e.g.*, *SEC* v. *Palmisano*, 135 F.3d 860, 863-864 (2d Cir.) (discussing effect on disgorgement obligation of payments made pursuant to criminal restitution order), cert. denied, 525 U.S. 1023 (1998). A meaningful portion of the disgorgement amounts in SEC actions that do not get distributed to investors is attributable to large awards in a limited number of Foreign Corrupt Practices Act (FCPA) cases, in which the defendants are unjustly enriched by obtaining business through bribery but the injury to investors is diffuse and hard to identify. See, *e.g.*, U.S. SEC, Press Release, *VimpelCom to Pay $795 million in Global Settlement for FCPA Violations* (Feb. 18, 2016), www.sec.gov/news/pressrelease/2016-34.html (last visited Mar 26, 2017).

But the regulation he cites relates only to administrative proceedings, in which the SEC itself decides the feasibility question. See 17 C.F.R. 201.1102; *Martin* v. *United States SEC*, 734 F.3d 169, 170 (2d Cir. 2013) (per curiam). In judicial proceedings, the SEC recommends distribution if feasible, but the district court controls what happens to the funds. See *Quan*, 817 F.3d at 594.[5]

Petitioner correctly observes (Br. 27) that compensation is not the "primary purpose of disgorgement." *Commonwealth*, 574 F.2d at 102. When the SEC seeks disgorgement, it acts in the public interest, to remedy harm to the public at large, rather than standing in the shoes of particular injured parties. See, *e.g.*, *SEC* v. *Lorin*, 869 F. Supp. 1117, 1128-1130 (S.D.N.Y. 1994). It is nevertheless clear that, in practice, disgorgement in SEC enforcement actions has a significant compensatory aspect.

c. The text and history of the securities laws demonstrate Congress's understanding that the disgorgement remedy in SEC actions is not a penalty because it is not punitive.

By the 1980s, district courts had for some time been ordering disgorgement, under their injunctive powers, in SEC suits. See, *e.g.*, *SEC* v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1307-1308 (2d Cir.), cert. denied, 404 U.S. 1005 (1971); *SEC* v. *First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989). But Congress was concerned that "[d]isgorgement of illegal profits * * * merely restores a defendant to his

---

[5] In this case, the district court did not specify what should happen to the amount ordered to be disgorged. See Pet. App. 47a. Petitioner argued that he was insolvent, see D. Ct. Doc. 180, at 3 (Jan. 7, 2015), and he is therefore unlikely to pay anything.

original position without extracting a real penalty for his illegal behavior." H.R. Rep. No. 355, 98th Cong., 1st Sess. 7 (1983) (1983 House Report). Congress therefore authorized the Commission to obtain in insider-trading cases a "civil penalty" that "shall not exceed three times the profit gained or loss avoided as a result of such unlawful purchase or sale." Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, § 2, 98 Stat. 1264; see 1983 House Report 8 (stating that "[t]he new penalty may be used in addition to existing remedies," including "disgorgement of ill-gotten gains").

In 1990, Congress expanded the Commission's power to seek civil penalties to cover securities-law matters outside the insider-trading context. See 15 U.S.C. 78u(d)(3); Enforcement Remedies Act, Pub. L. 101-429, 104 Stat. 931. The House Report explained that, while securities-law violators could "reap enormous profits," such violators were subject only to "an order of disgorgement," which "merely requires the return of wrongfully obtained profits; it does not result in any actual economic penalty or act as a financial disincentive to engaging in securities fraud." 1990 House Report 17; see *ibid.* ("even a violator who is caught is * * * no worse off financially than if he had not violated the law"); S. Rep. No. 337, 101st Cong., 2d Sess. 9 (1990) (similar); *Official Comm. of Unsecured Creditors of WorldCom, Inc.* v. *SEC*, 467 F.3d 73, 81 (2d Cir. 2006) (Sotomayor, J.). Congress therefore deemed civil penalties "necessary for the deterrence of securities law violations that otherwise may provide great financial returns." 1990 House Report 17.

In 2002, Congress added to 15 U.S.C. 78u a subsection stating that, "[i]n any action or proceeding

brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors." 15 U.S.C. 78u(d)(5); see Sarbanes-Oxley Act of 2002, Pub. L. 107-204, § 305(b), 116 Stat. 779; see also S. Rep. No. 205, 107th Cong., 2d Sess. 27 (2002) (discussing disgorgement). Congress did not place that subsection under the existing heading in 15 U.S.C. 78u for "[m]oney [p]enalties in [c]ivil [a]ctions." 15 U.S.C. 78u(d)(3). Rather, Congress placed the provision in a separate part of Section 78u and gave it its own heading: "[e]quitable [r]elief." Sarbanes-Oxley Act § 305(b), 116 Stat. 779; see 15 U.S.C. 78u(d)(5); *Tull* v. *United States*, 481 U.S. 412, 425 (1987).[6]

Thus, over the lengthy period in which courts have regularly ordered disgorgement at the Commission's behest, Congress has indicated its understanding that disgorgement cannot appropriately be termed a "penalty." See 15 U.S.C. 7246 (referring separately to "disgorgement" and "civil penalty"); 15 U.S.C. 80a-9(e) (same); see also pp. 44-45, *infra* (noting various statutory references to disgorgement in SEC actions).[7] If Congress had viewed disgorgement as

---

[6] Petitioner states (Br. 25) that, in a provision outside the securities laws and not relevant to this case, authorization for disgorgement appears in a subsection in a section on "civil penalties." But disgorgement—along with restitution, which is plainly not a penalty—is described in that provision as an "[e]quitable remed[y]." Pub. L. No. 111-203, Tit. VII, § 744, 124 Stat. 1735 (2010); see 7 U.S.C. 13a-1(d)(3).

[7] Petitioner regards 15 U.S.C. 78u-6(b)(1), which allows whistleblowers to receive an amount "equal to" (rather than derived from) money collected from the defendant in some SEC cases, as evi-

punitive, it might have concluded that civil-penalty provisions were not necessary in the first place.

3. Petitioner's Arguments That Disgorgement Is A "Penalty" Under Section 2462 Lack Merit

a. Petitioner's primary argument is that *every* non-compensatory remedy is a penalty. That understanding is flawed.

i. Petitioner rests his argument largely on *Kelly* v. *Robinson*, 479 U.S. 36 (1986), in which this Court interpreted a Bankruptcy Code provision enacted in 1978 that makes nondischargeable a debt that is for a "fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss." 11 U.S.C. 523(a)(7); see Pet. Br. 28. This Court held that "any condition a state criminal court imposes as part of a criminal sentence," including a restitution order, is nondischargeable under that provision. *Kelly*, 479 U.S. at 50.

That conclusion is not relevant to interpreting the word "penalty" in Section 2462. In *Kelly*, the Court considered "the language of" the bankruptcy provision "in light of" considerations specific to bankruptcy law and to the status of the restitution order as part of a state-court criminal judgment. 479 U.S. at 43-44. The Court emphasized that courts had traditionally "refused to allow a discharge in bankruptcy to affect the judgment of a state criminal court," *id.* at 45; noted that "Congress enacted the Code in 1978 against the

---

dence that Congress views "penalties" and "disgorgement" as interchangeable. Br. 28. Section 78u-6(b)(1) lists those remedies separately, and otherwise expresses no view about the relationship between them.

background of [that] established judicial exception," *id.* at 46; and stated that "[o]ur interpretation * * * must reflect * * * a deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings," which have punitive goals and involve "an important aspect of the sovereignty retained by the States," *id.* at 47; see *id.* at 49, 51. None of those considerations is implicated here.

Petitioner also invokes what he describes (Br. 29) as a "long line of cases establishing that * * * non-compensatory remedies are 'penalties.'" But those decisions establish only that a compensatory remedy is *not* a penalty because it is not punitive. In *Brady* v. *Daly*, 175 U.S. 148 (1899), for example, the Court ruled that a suit seeking "damages" under a copyright statute was not "an action to recover for a forfeiture or penalty" because the copyright statute did not "speak of punishment or penalties" but instead used language "provid[ing] for the recovery * * * of full compensation from the wrongdoer." *Id.* at 152, 154; see *id.* at 155. In *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390 (1906), the Court ruled that the limitations period under a predecessor to Section 2462 did not apply to an injured party's suit for damages in an antitrust case. See *id.* at 395-397. And in *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946), the Court stated that the equitable "disgorgement" remedy sought by the government in that case, which would have resulted in the defendant refunding money to injured parties, "differs greatly from the damages and penalties which may be awarded" under a separate provision of the relevant statute.

Id. at 402; see *id.* at 396-397.[8] But the fact that a compensatory remedy is *not* a penalty does not mean that every non-compensatory remedy *is* a penalty. Whether a penalty exists depends on whether the remedy is "punitive," *Meeker*, 236 U.S. at 423, not (or not exclusively) on whether it is compensatory.

ii. In any event, disgorgement in SEC actions is often used to compensate victims of securities-law violations. See pp. 19-22, *supra*. Petitioner's approach logically implies that disgorgement is not a penalty when the district court orders the funds distributed to victims, but is a penalty when the court finds such distribution infeasible. That approach would substantially complicate the application of Section 2462 to particular cases, and it would give defendants who victimize large numbers of small investors (as petitioner did), thus making distribution of any disgorgement amount more difficult, a greater chance of keeping unlawful gains. It would also imply that even amounts that Congress has labeled "civil penalties" could sometimes be considered non-penal for statute-of-limitations purposes, because those penalties may likewise be distributed to injured parties. See 15 U.S.C. 7246(a).

---

[8] Petitioner reads *Porter* to hold that the remedy available to the government under Section 205(e) of the relevant statute was a penalty "precisely because it went to the Treasury." Br. 31. *Porter* says no such thing. The Court's passing references to the government's remedy under Section 205(e) as "damages in the nature of penalties," see 328 U.S. at 401-402, were most likely due to Section 205(e)'s provision for recovery that far exceeded the amount of the relevant "overcharge" (by trebling that amount and adding a fine). See *id.* at 406 n.9 (Rutledge, J., dissenting); see also *id.* at 406 (describing statutory recovery by injured person as "damages with penalty").

b. Petitioner suggests (Br. 23) that any remedy with a deterrent purpose or effect is a "penalty" under Section 2462. But "provisions for damages are, of course, deterrents of default," *Priebe & Sons, Inc.* v. *United States*, 332 U.S. 407, 413 (1947), and "[t]he historic injunctive process was designed to deter, not to punish," *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944). Thus, even an "obvious deterrent purpose" is not alone sufficient to "mark[ ]" a remedy "as a form of punishment," although it may be relevant to that determination. *Department of Revenue* v. *Kurth Ranch*, 511 U.S. 767, 780 (1994); cf. *Hudson* v. *United States*, 522 U.S. 93, 102 (1997) (explaining that a "test for determining whether a particular sanction is 'punitive'" for double jeopardy purposes that turns on whether it is "'solely' remedial (*i.e.*, entirely nondeterrent)" has "proved unworkable"); *United States* v. *Ursery*, 518 U.S. 267, 291-292 (1996); *Coghlan* v. *NTSB*, 470 F.3d 1300, 1305-1307 (11th Cir. 2006).

c. Petitioner also argues (Br. 32-35) that his view of disgorgement is supported by a tradition of guarding against the "danger" of government-inflicted penalties. But tracing ancient English provisions specifically relating to penal laws (*e.g.*, Br. 33-34) does not help to decide whether disgorgement is punitive in the relevant sense. That is particularly true given that the "amercements" to which petitioner points were "criminal sanction[s]," *Solem* v. *Helm*, 463 U.S. 277, 284 & n.8 (1983), and the restrictions ultimately placed on those sanctions under English law—requiring the kind of proportionality embodied in the Constitution's Excessive Fines Clause—applied only in criminal cases, see *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 272 (1989).

This case implicates another principle that would have been well known to the drafters of the 1839 statute: the rule that a sovereign is not subject to a limitations period unless it expressly consents to one. See, *e.g.*, *BP Am. Prod. Co.* v. *Burton*, 549 U.S. 84, 95-96 (2006) (tracing that canon to "the traditional rule *quod nullum tempus occurrit regi*—time does not run against the King"); *United States* v. *Thompson*, 98 U.S. 486, 489-490 (1879); *United States* v. *Hoar*, 26 F. Cas. 329, 329-330 (D. Mass. 1821) (Story, J.). If Congress chooses to impose time limits when the government pursues penal remedies, but not when it pursues disgorgement, that is Congress's prerogative. That choice makes particular sense with respect to SEC actions, where no special "danger" exists because disgorgement amounts in such actions are often directed away from "the government's coffers." Pet. Br. 32.

Petitioner suggests (Br. 35-37) that courts in some SEC cases have conceived of disgorgement so broadly as to go beyond the core purpose of preventing unjust enrichment. The disgorgement order in this case does not implicate that concern, but rather involves money that petitioner stole from small investors and directed in ways that benefited him.[9] More generally, defendants are protected by the various equitable limitations that courts have placed on the use and scope of the

---

[9] Petitioner's suggestion that the disgorgement amount in this case includes money taken by other people is wrong. Petitioner *used* the stolen money not only by funding his own extravagant lifestyle but also by directing money to the Advisers, which he owned and controlled, to pay expenses for which he would otherwise have been responsible. Cf. *Salman* v. *United States*, 137 S. Ct. 420 (2016).

disgorgement remedy. See, *e.g.*, *SEC* v. *Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1104-1105 (2d Cir. 1972) (order to disgorge income earned on ill-gotten gains was punitive and therefore outside the court's equity powers); *First City*, 890 F.2d at 1231 (disgorgement may be ordered only in an amount "causally connected" to the wrongdoing). The fact that "the burden of uncertainty in calculating ill-gotten gains falls on the wrongdoers who create that uncertainty," *Zacharias*, 569 F.3d at 473 (citation omitted); see, *e.g.*, *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946), does not render disgorgement punitive.

d. Finally, petitioner contends that the government has taken inconsistent positions on whether disgorgement constitutes a penalty. But none of the positions to which petitioner points involved Section 2462, which must be interpreted in light of its specific language and context.

i. As petitioner explains (Br. 37-38), the government argued in the 1990s that disgorgement is a "fine, penalty, or forfeiture" under 11 U.S.C. 523(a)(7). As noted above, however, interpretation of that Bankruptcy Code provision is governed by principles that have no application here. See pp. 25-26, *supra*.[10] And in any event, in 2002, Congress amended Section 523 by adding to the list of non-dischargeable debts any debt that is for "the violation of any of the Federal securities laws" and results from "any court or administrative order for any damages, fine, penalty, citation,

---

[10] One of the bankruptcy decisions on which petitioner relies (Br. 37)—*In re Telsey*, 144 B.R. 563 (Bankr. S.D. Fla. 1992)—has been vacated at the SEC's request. See SEC Reply Br., *SEC* v. *Graham*, No. 14-13562 (11th Cir.), Addendum 5-9; see also *Lorin*, 869 F. Supp. at 1124-1125 (distinguishing *Telsey*).

restitutionary payment, disgorgement payment, * * * or other payment owed by the debtor." 11 U.S.C. 523(a)(19); see Sarbanes-Oxley Act § 803(3), 116 Stat. 801. That provision treats "disgorgement" in securities cases as separate from both "fine[s]" and "penalt[ies]," while making clear that debts arising from disgorgement orders are non-dischargeable.

ii. Petitioner next asserts (Br. 38) that the government has treated securities-law disgorgement orders as falling within the scope of a tax provision that prohibits deductions for "any fine or similar penalty paid to a government for the violation of any law." 26 U.S.C. 162(f). He points only to a non-precedential 2016 IRS "advice" memorandum. Thomas D. Moffitt, Office of Associate Chief Counsel, IRS, Memorandum No. 201619008, at 1 (Jan. 29, 2016), https://www.irs.gov/pub/irs-wd/201619008.pdf (Memorandum); see 26 U.S.C. 6110. That memorandum takes the position that disgorgement may or may not qualify as a "fine or similar penalty" under the tax law depending "on the facts and circumstances of a particular case." *Id.* at 8.

Nothing in that determination contradicts the conclusion that disgorgement in securities cases is not a "penalty" within the meaning of Section 2462. Section 2462 traces back to the early 1800s; Section 162(f) was enacted in 1969. See Pub. L. No. 91-172, Tit. IX, § 902(a), 83 Stat. 710. While the two provisions both use the words "fine" and "penalty," they otherwise have different language, and they have wholly different purposes. In addition, under the tax law a payment can qualify as a "fine or similar penalty" even if it does not "punish[]" but merely deters. Memoran-

dum 6-7 (citation omitted). The meaning of "penalty" under Section 2462 is very different.

iii. Petitioner also suggests that the government has taken an inconsistent position by characterizing criminal forfeiture of criminal proceeds as "monetary punishment." Br. 39; see *id.* at 25-26. Petitioner is mistaken. The brief in opposition on which he relies merely echoes this Court's conclusion that an "*in personam* criminal forfeiture" that includes criminal proceeds "is clearly a form of monetary punishment." *Alexander* v. *United States*, 509 U.S. 544, 558 (1993). The government's use of the word "punishment" to describe a forfeiture imposed as part of the sentence for a crime has no bearing on whether disgorgement in an SEC civil suit is a "penalty" under Section 2462. Cf. *Pasquantino* v. *United States*, 544 U.S. 349, 365 (2005) (stating that "[t]he purpose of awarding restitution in" a criminal prosecution is "to mete out appropriate criminal punishment for [the defendant's] conduct"); *Kelly*, 479 U.S. at 53 (construing 11 U.S.C. 523(a)(7) in light of the fact that "criminal proceedings focus on the State's interests in rehabilitation and punishment, rather than the victim's desire for compensation").

B. Disgorgement Is Not A "Forfeiture" Under Section 2462

1. Like "penalty," the word "forfeiture" can have different meanings in different contexts. See, *e.g.*, *United States* v. *Mann*, 26 F. Cas. 1153, 1154 (C.C.D.N.H. 1812) (No. 15,718) (Story, J.); *Black's Law Dictionary* 883-884 (1st ed. 1891). As with "penalty," however, this Court has already interpreted "forfeiture" as it is used in the provision at issue here, as part of a limited list of remedies to which the five-

year statute of limitations applies. For purposes of Section 2462, "forfeiture," too, means a punishment. As this Court explained in *Meeker*, *supra*, interpreting a predecessor to Section 2462, "[t]he words 'penalty or forfeiture' in this section refer to something imposed in a punitive way for an infraction of a public law." 236 U.S. at 423; cf. *Gabelli*, 133 S. Ct. at 1223.

That interpretation is consistent with pertinent definitions of "forfeiture." In St. George Tucker's early American edition of Blackstone, published in 1803, "forfeiture" was described as "a punishment for some crime or misdemeanor[] in the party forfeiting." 3 St. George Tucker, *Blackstone's Commentaries with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* 420 (1803); see *ibid.* (stating that "goods and chattels may be acquired and lost * * * by forfeiture" as a punishment and describing fines as "forfeitures"); *id.* at 267 (forfeiture of property is "a punishment annexed by law to some illegal act or negligence, in the owner of lands, tenements, or hereditaments"). Other nineteenth-century definitions were similar. See, *e.g.*, Samuel Johnson et al., *Johnson's English Dictionary* 400 (1834) (defining the noun "forfeit" as "[s]omething lost by the commission of a crime; a fine; a mulct," the adjective "forfeit" as "[l]iable to penal seizure; alienated by a crime," and the noun "forfeiture" as "[t]he thing forfeited; a mulct, a fine") (cited in Pet. Br. 13); *Black's Law Dictionary* 507-508 (1st ed. 1891); see also *Reisinger*, 128 U.S. at 402 ("the words 'penalty,' 'liability,' and 'forfeiture' * * * have been used by the great masters of crown law and the elementary writers as synonymous with the word 'punishment'").

That interpretation is also consistent with the way that the terms "fine, penalty, or forfeiture" are used together in Section 2462. See Pet. App. 15a; *McDonnell* v. *United States*, 136 S. Ct. 2355, 2368 (2016) (explaining that "the familiar interpretive canon *noscitur a sociis*," under which "a word is known by the company it keeps," is "often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress") (citation and internal quotation marks omitted). As explained above, a "penalty" is inherently punitive. So too is a "fine," which can be assessed as a punishment for a violation of the law regardless of the profit made, the harm caused, or a defendant's particular circumstances. See *Browning-Ferris*, 492 U.S. at 265 ("the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense"). Because the term "forfeiture" is readily—indeed, most naturally—understood to refer to a punitive measure, see, *e.g.*, *Austin* v. *United States*, 509 U.S. 602, 612-614, 618, 621 (1993) ("We conclude * * * that forfeiture generally and statutory *in rem* forfeiture in particular historically have been understood, at least in part, as punishment."); *Peisch* v. *Ware*, 8 U.S. (4 Cranch) 347, 364 (1808) (forfeiture of goods under customs statute "punishes"), it should bear that meaning when joined in a list with two other terms that are traditionally associated with punishment. For purposes of Section 2462, disgorgement therefore is not a "forfeiture" for the same reasons it is not a "penalty."

2. When Congress enacted the 1839 provision that ultimately became Section 2462, the word "forfeiture" would have been understood (as the court of appeals

correctly explained, see Pet. App. 14a) to refer to *in rem* forfeitures that "punished" guilty property. It also would have been understood as a synonym for a fine. In no event would the 1839 Congress—or the 1948 Congress that enacted the current version of the statute-of-limitation provision—have envisioned that "forfeiture" could cover a personal judgment for disgorgement of ill-gotten gains.

a. "Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture upon conviction for a felony or treason, and statutory forfeiture." *Austin*, 509 U.S. at 611.[11] Only the third kind "took hold" in this country: *in rem* "statutory forfeitures of offending objects used in violation of the customs and revenue laws." *Id.* at 612-613 (citation omitted); see, *e.g.*, *United States* v. *92 Buena Vista Ave.*, 507 U.S. 111, 118-123 (1993) (opinion of Stevens, J.).

An 1839 statutory reference to "forfeiture" would have been understood as referring to such *in rem* forfeiture. Indeed, Justice Story observed in *United States* v. *Mann*, 26 F. Cas. 1153 (C.C.D.N.H. 1812) (No. 15,718), that statutes "frequently" use "the word 'forfeiture'" to mean "forfeitures in rem." *Id.* at 1154.

That kind of forfeiture is punitive in the relevant sense. It was conceived of as punishing the property itself, regardless of the guilt or innocence of the property's owner. See *Austin*, 509 U.S. at 615-616 (collecting cases); *United States* v. *Bajakajian*, 524 U.S.

---

[11] "At common law the value of an inanimate object directly or indirectly causing the accidental death of a King's subject was forfeited to the Crown as a deodand." *Austin*, 509 U.S. at 611 (citation omitted).

321, 329-330 (1998). It also had the practical effect of punishing the owner for any negligence he may have shown in allowing his property to become associated with illicit activity. See *Austin*, 509 U.S. at 616-618; see also *id.* at 611 (explaining that all three kinds of forfeiture known to the Founders were "understood, at least in part, as imposing punishment"); *id.* at 612-614 (stating that *in rem* forfeiture was considered "penal" by Blackstone, and that "the First Congress viewed forfeiture as punishment"). Cf. *Bajakajian*, 524 U.S. at 330-331 (stating that "traditional civil *in rem* forfeitures * * * were historically considered nonpunitive" as to the owner of the property, although punitive as to the property itself).[12]

In 1839, the term "forfeiture" also could have been understood to mean a fine—a fixed "pecuniary mulct." *Mann*, 26 F. Cas. at 1154; see, *e.g.*, *Austin*, 509 U.S. at 614 & n.7 (noting that "forfeit" was the word used for "fine" in a 1789 statute, and that "[d]ictionaries of the time confirm that 'fine' was understood to include 'forfeiture' and vice versa"); *Black's Law Dictionary* 508 (1st ed. 1891) (forfeiture involves a "loss of land,"

---

[12] Petitioner quotes *Taylor* v. *United States*, 44 U.S. (3 How.) 197, 210 (1845), as stating that seizure of offending goods under the customs laws was "truly . . . remedial." Br. 14. But *Taylor* also states that, "[i]n one sense, every law imposing a penalty or forfeiture may be deemed a penal law." 44 U.S. (3 How.) at 210. Compare *Austin*, 509 U.S. at 612-622 (discussing Excessive Fines Clause), with *Ursery*, 518 U.S. at 270-271, 274 (discussing Double Jeopardy Clause); see *id.* at 295 (Kennedy, J., concurring) ("Forfeiture, then, punishes an owner by taking property involved in a crime, and it may happen that the owner is also the wrongdoer charged with a criminal offense. But the forfeiture is not a second *in personam* punishment for the offense, which is all the Double Jeopardy Clause prohibits.").

"loss of goods or chattels," or a fine); 1 *Webster's Dictionary* 86 (1828) (defining the noun "forfeiture" as "an estate forfeited; a fine or mulct. The prince enriched his treasury by fines and *forfeitures*.") (cited in Pet. Br. 13). A fine is itself a penalty, and "fine" independently appears in the current version of the limitations provision. See 28 U.S.C. 2462.[13]

Disgorgement is very different from an *in rem* forfeiture or fine. Disgorgement does not punish either the defendant or his property; it does not extend beyond the amount of a defendant's unjust enrichment; it does not derive from admiralty law, customs law, or criminal law; and it is equitably and flexibly applied. Cf. *Gladding*, 58 U.S. (17 How.) at 453-455 (distinguishing between an accounting for profits and "forfeiture"). Accordingly, disgorgement is not a "forfeiture" within the meaning of Section 2462.[14]

b. Petitioner contends (Br. 12-13) that "forfeiture" in Section 2462 has a far broader meaning, covering "any order to turn over money to the government, as sovereign, as a result of a legal transgression." That sweeping definition does not withstand scrutiny. In any event, petitioner has not identified any form of historical forfeiture that resembled disgorgement.

---

[13] Petitioner points out (Br. 20) that 28 U.S.C. 2461, which dates from 1948, see 1947 House Report A190, refers separately to a "pecuniary forfeiture" and a "forfeiture of property." The term "pecuniary forfeiture" is readily understood to encompass a fine.

[14] Petitioner identifies (Br. 22) a few stray sentences in which courts have referred to disgorgement as a forfeiture, or vice-versa. Those passages simply reflect the colloquial meanings of those words, and in particular the loose sense that something given back or given up has been disgorged. They have no bearing on whether the disgorgement remedy in SEC actions falls within the scope of "forfeiture" in Section 2462.

Petitioner acknowledges (Br. 14-15) that "forfeiture" encompasses fines and *in rem* forfeitures (although he characterizes the latter as purely remedial). To justify his expansive definition of forfeiture, however, he includes two other categories as well. First, he contends (Br. 14) that "forfeiture" refers to "forfeiture of estate," *Austin*, 509 U.S. at 613, requiring criminals to give all their real and personal property to the sovereign. But since forfeiture of estate was outlawed in the United States from this country's inception (see Br. 14), it is unlikely that Section 2462 was intended to provide a statute of limitations that covered it.

Second, petitioner states (Br. 15) that "forfeiture" refers to early customs statutes requiring a party to "forfeit and pay" a sum that is a multiple of the value of goods unlawfully imported or sold. But the mere existence of the word "forfeit" in the statute does not make the amount in question a "forfeiture." This Court explained in *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943), that "[s]pecial consequence cannot be drawn from the use of the word 'forfeit'" since "[t]he words 'forfeit and pay' are wholly consistent with a civil action for damages," *id.* at 551 (citation omitted)—an action that petitioner would not describe as a forfeiture. See Pet. Br. 12-13; see also 60 N.Y. Jur. 2d *Forfeitures and Penalties* § 1 (2d ed. 2016) ("A statute that provides that upon its violation the offender 'forfeits' a certain sum of money prescribes, in reality, a penalty, rather than imposing a forfeiture, as that term is properly used.") (footnote omitted); see generally Walter Scott, *Lay of the Last Minstrel*, Canto VI, at 176 (5th ed. 1806) ("The wretch, concentrated all in self, * * * shall forfeit

fair renown."). The statutes to which petitioner refers are better understood as having imposed either penalties or a form of liquidated damages for the losses the government "accru[ed] from the evasion of customs duties." *Bajakajian*, 524 U.S. at 342. Indeed, in discussing those statutes this Court has referred to "payment of monetary penalties proportioned to the goods' value." *Id.* at 340; see *id.* at 341 (referring to payments as "forfeitures" with the word in quotation marks); *id.* at 345 (Kennedy, J., dissenting) (referring to a "six-century-long tradition of *in personam* customs fines equal to one, two, three, or even four times the value of the goods at issue").

Whether or not those remedies are "forfeiture[s]" within the meaning of Section 2462, petitioner does not claim to have identified any historic form of "forfeiture" equivalent to disgorgement. His only effort to compare disgorgement to some long-ago type of forfeiture (Br. 17-19) is to point to the statutes requiring defendants to pay multiples of some unlawful property's value. There is an obvious difference, however, between a remedy that is limited to a defendant's ill-gotten gains and a remedy defined as a fixed *multiple* of that amount. Provisions involving such multiples may be justified as penalties, or (at least in some instances) as reasonable liquidated damages. Unlike disgorgement, however, they are not equitable remedies analogous to restitution.

c. As petitioner recognizes (Br. 16), it was not until the 1970s that existing forfeiture provisions were expanded to allow for *in personam* criminal forfeiture and to cover "proceeds" of a crime, which include both the criminal's illicit gains and any profits earned on those gains. See, *e.g.*, 18 U.S.C. 1963(a)(3); 18 U.S.C.

981(a)(1)(C); see also *Bajakajian*, 524 U.S. at 332 & n.7 ("The First Congress [in 1790] explicitly rejected *in personam* forfeitures as punishments for federal crimes, and Congress reenacted this ban several times over the course of two centuries.") (citation omitted); *92 Buena Vista Ave.*, 507 U.S. at 121-123 & n.16 (opinion of Stevens, J.); Stefan D. Cassella, *Asset Forfeiture Law in the United States* § 25-4, at 900 (2d ed. 2013) (Cassella) (stating that forfeiture of proceeds is a "relatively recent innovation"). Thus, when Section 2462 and its predecessors were enacted, the word "forfeiture" would not have been understood to include a remedy like disgorgement, which makes a defendant personally liable for payment of the amount of the gains he realized through securities violations (but not for any profits realized from those gains).

It is true that, when Congress decided to strip certain criminals of the proceeds of their crimes, it called that measure a "forfeiture." That enabled the new sanction to be implemented using established forfeiture procedures, both in criminal cases as part of a sentence and in civil *in rem* proceedings.[15] But Congress's use of the term "forfeiture" in statutes that long postdate Section 2462 has no meaningful bearing on the proper interpretation of that statute or its predecessors. See Cassella § 2-1, at 28 ("laws and concepts that developed slowly * * * were greatly expanded in the last 20 years"); *id.* § 2-4, at 33 (changes in the 1970s to encompass proceeds were "entirely new" and "a dramatic expansion").

---

[15] Such forfeiture proceedings have their own statute of limitations separate from Section 2462. See, *e.g.*, 19 U.S.C. 1621 (statute of limitations governing civil forfeiture, which includes a discovery rule); 18 U.S.C. 981(d).

To be sure, Section 2462 is not limited to the "specific set of circumstances that may have precipitated its passage." *United States* v. *Rodgers*, 466 U.S. 475, 480 (1984) (cited in Pet. Br. 17). Section 2462 applies to government claims for fines, penalties, or forfeitures for violating newly enacted statutory prohibitions, just as it applies to financial punishments for violating longstanding legal norms. But the *term* "forfeiture" in Section 2462 retains the meaning it had when that provision was enacted, and disgorgement would not have been considered a "forfeiture" at that time. Petitioner has not challenged (and did not challenge below) the district court's authority to order disgorgement in securities-law cases as "an equitable adjunct to an injunction decree," *Porter*, 328 U.S. at 399, or a "restorative injunction," *United States* v. *Telluride Co.*, 146 F.3d 1241, 1247 (10th Cir. 1998); see 15 U.S.C. 78u(d)(1) and (5). In any event, disgorgement's status as an equitable remedy reinforces the conclusion that it is neither a penalty nor a forfeiture within the meaning of Section 2462.

C. Extending Section 2462 To Cover Disgorgement Is Inconsistent With The Purposes Of Statutes Of Limitations And Would Have Harmful Consequences

1. In stressing "the importance of time limits on penalty actions," this Court in *Gabelli* relied on authority "stating that it 'would be utterly repugnant to the genius of our laws' if actions for penalties could 'be brought at any distance of time.'" 133 S. Ct. at 1223 (quoting *Adams* v. *Woods*, 6 U.S. (2 Cranch) 336, 342 (1805)). The same concern underlies Congress's enactment of statutes of limitations for all but the most serious federal crimes. See, *e.g.*, 18 U.S.C. 3282.

By contrast, "there are few credible arguments that a defendant should be permitted to retain his or her ill-gotten gains, regardless of how much time has elapsed since the misconduct in question." Steven R. Glaser, *Statutes of Limitations for Equitable and Remedial Relief in SEC Enforcement Actions*, 4 Harv. Bus. L. Rev. 129, 153 (2014). No principle of fairness gives a "robber[]" an absolute right to keep his "loot" if only his wrongdoing remains hidden long enough. *Luis* v. *United States*, 136 S. Ct. 1083, 1090 (2016); see generally Jeremy Bentham, *The Rationale of Punishment* 432 (1830) ("In crimes the object of which is pecuniary profit, prescription [*i.e.*, a limitations period] ought not in any case to operate so as to protect the delinquent in the enjoyment of his ill-gotten acquisition.").

The proper comparison therefore is not between disgorgement and criminal penalties, see Pet. Br. 43, but between disgorgement and other equitable remedies granted in government civil suits. Such remedies often are subject to no statute of limitations at all. See generally *E.I. Dupont De Nemours & Co.* v. *Davis*, 264 U.S. 456, 462 (1924) ("[A]n action on behalf of the United States in its governmental capacity * * * is subject to no time limitation, in the absence of congressional enactment clearly imposing it."); *Holmberg* v. *Armbrecht*, 327 U.S. 392, 396-397 (1946); *SEC* v. *Rind*, 991 F.2d 1486, 1491 (9th Cir.) (collecting examples), cert. denied, 510 U.S. 963 (1993); Catherine E. Maxson, Note, *The Applicability of Section 2462's Statute of Limitations to SEC Enforcement Suits in Light of the Remedies Act of 1990*, 94 Mich. L. Rev. 512, 513-514 (1995) ("Despite the existence of the general statutes of limitations in title 28, many gov-

ernment suits remain unrestricted by any time bar."); see also 28 U.S.C. 1658 (Supp. II 1990). In *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355 (1977), for example, this Court held that no statute of limitations applied to EEOC enforcement actions under Title VII. See *id.* at 367-373.

To be sure, even in the absence of a statutory time bar, a court may take into account the passage of time since the underlying violation in determining whether particular equitable relief is appropriate. Courts that have correctly found disgorgement to be outside the scope of Section 2462 have recognized that "[a] court can and should consider the remoteness of the defendant's past violations in deciding whether to grant the requested equitable relief." *Rind*, 991 F.2d at 1492; see, *e.g.*, *SEC* v. *Wyly*, 56 F. Supp. 3d 394, 433 (S.D.N.Y. 2014); see generally *Occidental*, 432 U.S. at 373 (holding that a court's discretionary power "'to locate "a just result" in light of the circumstances peculiar to the case'" can be exercised "when the EEOC is the plaintiff") (quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 424 (1975)). But the existence of that equitable discretion does not support petitioner's contention that the district court was categorically barred from ordering disgorgement of funds that petitioner wrongfully obtained more than five years before this suit was filed.

2. a. The approach we advocate has been rejected only by the Eleventh Circuit, which in 2016 became the first court of appeals to rule that Section 2462 applies when the SEC seeks disgorgement. See *SEC* v. *Graham*, 823 F.3d 1357 (11th Cir. 2016).[16] All the

---

[16] Petitioner does not adopt or defend *Graham*'s specific reasoning. See 823 F.3d at 1363-1364.

courts of appeals that had previously addressed the question had found Section 2462 inapplicable to that remedy. See, *e.g.*, *Riordan* v. *SEC*, 627 F.3d 1230, 1234-1235 & n.1 (D.C. Cir. 2010); *SEC* v. *Tambone*, 550 F.3d 106, 148 (1st Cir. 2008), reh'g en banc granted and opinion withdrawn, 573 F.3d 54 (1st Cir. 2009), reinstated in relevant part, 597 F.3d 436 (1st Cir. 2010); *Johnson* v. *SEC*, 87 F.3d 484, 491-492 (D.C. Cir. 1996); see generally *Rind*, 991 F.2d at 1490-1493; Mitchell A. Lowenthal et al., Special Project, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 Cornell L. Rev. 1011, 1023 n.65 (1980).

For nearly half a century, then, courts have viewed disgorgement as a permissible remedy in SEC enforcement actions without regard to any statute of limitations. During that period, Congress has enacted statutory provisions that assume the availability of a disgorgement remedy in SEC enforcement suits. See, *e.g.*, Pub. L. No. 104-67, § 103(b)(2), 109 Stat. 756 (1995) (stating that funds may be "disgorged as the result of an action brought by the Commission in Federal court" and placing a restriction on how those funds may be "distributed" to "private parties") (codified at 15 U.S.C. 78u(d)(4)); Pub. L. No. 100-704, § 5(b)(2), 102 Stat. 4681 (1988) (stating that defendant in insider-trading case can offset "the amounts * * * that such person may be required to disgorge, pursuant to a court order obtained at the instance of the Commission," against a damages award) (codified at 15 U.S.C. 78t-1(b)(2)); Pub. L. No. 107-204, § 308(c)(1), 116 Stat. 785 (2002) (calling for study of "enforcement actions by the Commission * * * that have included proceedings to obtain * * * disgorgements to identi-

fy areas where such proceedings may be utilized to efficiently, effectively, and fairly provide restitution for injured investors") (codified at 15 U.S.C. 7246(c)(1)); see also 1990 House Report 17. And Congress has placed time limits on other types of relief sought by the SEC, see, *e.g.*, 15 U.S.C. 78u-1(d)(5) (provision enacted in 1988 giving SEC five years from transaction to seek civil penalties for insider trading and stating that the limitation "shall not be construed to bar or limit in any manner any action by the Commission * * * under any other provision of this chapter"), as well as on securities actions brought by private parties, see 28 U.S.C. 1658(b) (provision enacted in 2002 limiting time to assert "private right of action" for certain claims "concerning the securities laws"). But Congress has not acted to impose any time restrictions on disgorgement, or on SEC enforcement actions more generally.

b. Petitioner has not shown that the prevailing approach to disgorgement has encouraged the SEC to delay filing suit or has unduly impaired defendants' ability to resist disgorgement claims. Because the Commission bears the burden of proof in securities-law enforcement actions, including the burden of establishing a causal connection between a violation and a disgorgement amount, any dulling of memories or loss of evidence is more likely to impede than to assist the SEC's litigation efforts. Cf. *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1976-1977 (2014). The SEC thus has strong incentives to ferret out fraud and other wrongdoing as quickly as possible, despite its limited resources. See *Rind*, 991 F.2d at 1492 ("[S]ecurities fraud may involve multiple parties and transactions of mind-boggling complexity. Mar-

ket manipulation is notoriously hard to detect."). Those incentives have been strengthened by *Gabelli*, under which the SEC must bring suit within five years of the relevant misconduct to obtain statutory penalties. See *Gabelli*, 133 S. Ct. at 1223-1224.[17]

Adopting petitioner's proposed construction of Section 2462, moreover, would not give any defendant the "right to be free of" certain "claims." *Order of R.R. Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 349 (1944). Even if the passage of time after a defendant's defalcations barred the SEC from obtaining disgorgement (as well as penalties), the agency could still bring securities-law claims like the ones in

---

[17] In fiscal year 2015, for example, the average time between the start of an SEC investigation and the commencement of an SEC enforcement action was 24 months. See U.S. SEC, *FY 2015 Annual Performance Report & FY 2017 Annual Performance Plan* 37, https://www.sec.gov/about/reports/sec-fy2015-fy2017-annual-performance.pdf (last visited Mar. 26, 2017). Petitioner suggests (Br. 4-5) that *Gabelli*'s holding has resulted in the filing of stale claims by the SEC. But all the cases he cites, including this one, were filed before *Gabelli* was decided in 2013, and several of them were filed within five years after the defendants' bad acts concluded. See, *e.g.*, Compl., *SEC* v. *Wyly*, *supra*, No. 10-cv-5760 (filed July 29, 2010); Compl., *SEC* v. *Crawford*, No. 11-cv-3656 (D. Minn.) (filed Dec. 21, 2011). Indeed, petitioner and his amici point to very few cases in which the SEC has brought enforcement actions that would be barred by Section 2462, despite the prevailing understanding that Section 2462 does not apply to actions for disgorgement or injunctions. Petitioner also suggests (Br. 5) that the Commission has increasingly resorted to disgorgement to circumvent the time bar on penalties—but statistics do not bear out that assertion. See SEC, *Select SEC and Market Data* 2 (2005-2016) (Tbl. 1) (showing that the ratio of disgorgement to penalties has varied considerably over the past decade and that 2013, when *Gabelli* was decided, did not mark a point of steady increase in that ratio), https:// www.sec.gov/reports (last visited Mar. 26, 2017).

this case against that defendant and seek other forms of injunctive relief, such as an order prohibiting a defendant like petitioner from serving in the kind of fiduciary capacity that enabled him to swindle investors. See generally *United States* v. *Whited & Wheless Ltd.*, 246 U.S. 552, 561, 563-564 (1918). And in cases that involve a continuing course of conduct, the SEC could file suit up to five years after the end of the misconduct and, at a minimum, seek disgorgement (and penalties) for any bad acts that had taken place within that five-year look-back period.

Here, for example, the suit against petitioner was brought within five years after some (but not all) of his embezzlement. Petitioner therefore would have been subject to the suit, and to a disgorgement remedy, even under his own interpretation of Section 2462. Adoption of petitioner's proposed rule would simply allow him to keep a significant amount of the money that he stole from the investors who trusted him.

3. Adoption of petitioner's expansive reading of Section 2462 would increase the incentives for bad actors to violate the securities laws, since those incentives will be greater if the passage of time can shield illicit gains from the possibility of recoupment. See *Texas Gulf Sulphur*, 446 F.2d at 1308 ("It would severely defeat the purposes of the Act if a violator of Rule 10b-5 were allowed to retain the profits from his violation."); see also *SEC* v. *Wyly*, 117 F. Supp. 3d 381, 390 & n.40 (S.D.N.Y. 2015) (discussing the "pains" defendants took to "hide the extent of their control" over U.S. issuers to frustrate government investigation).[18] Petitioner's approach would also reduce the

---

[18] Courts have interpreted the tolling doctrine of fraudulent concealment narrowly in the wake of *Gabelli*'s rejection of the

likelihood that victims will be compensated through distribution of disgorged funds. See, *e.g.*, *SEC* v. *Graham*, 21 F. Supp. 3d 1300 (S.D. Fla. 2014) (applying Section 2462 to prevent disgorgement of $300 million from Ponzi scheme), aff'd in part, rev'd in part, and remanded, 823 F.3d 1357 (11th Cir. 2016). And the adverse practical consequences of construing Section 2462 to encompass disgorgement would not be confined to securities-law cases, since the government regularly seeks disgorgement in other contexts as well, under general statutory grants of authority to give equitable relief. See, *e.g.*, *United States* v. *Universal Mgmt. Servs., Inc.*, 191 F.3d 750, 760 (6th Cir. 1999) (Federal Food, Drug, and Cosmetic Act), cert. denied, 530 U.S. 1274 (2000); *FTC* v. *Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996) (Federal Trade Commission Act).

4. Petitioner contends (Br. 40-41) that the dangers of government abuse are great if no limitations period applies to disgorgement. But because a disgorgement remedy simply divests the defendant of his illicit gains, it does not implicate the *Gabelli* Court's concern about punishing a defendant for long-ago violations. Petitioner asserts (Br. 41-42) that the absence of a statute of limitations "is especially troubling" because of "how the SEC enforces the law." But petitioner stole money while ostensibly acting as a fiduciary for investors; that conduct is and has long been obviously illegal.

Petitioner also contends (Br. 46) that the government's position is "capricious" because it treats dis-

---

discovery rule, finding that concealment is often part and parcel of the fraud itself. See *SEC* v. *Wyly*, 950 F. Supp. 2d 547, 556-558 (S.D.N.Y. 2013).

gorgement differently from other remedies. Congress has declined, however, to enact any statute of limitations under which the passage of time could bar an SEC enforcement action altogether. And Section 2462, the provision on which petitioner relies, is limited by its terms to specified remedies. There is nothing "capricious" about Congress's decision to limit the time within which the government can seek punitive sanctions, but not to limit the period for seeking an equitable remedy that simply divests the defendant of his illicit gains.

D. The Canon Of Narrow Construction Reinforces The Conclusion That Section 2462 Does Not Apply To Disgorgement

This Court has frequently applied the interpretive rule that "[s]tatutes of limitation sought to be applied to bar rights of the Government, must receive a strict construction in favor of the Government." *E.I. Dupont De Nemours*, 264 U.S. at 462; see, *e.g.*, *BP Am.*, 549 U.S. at 95-96 (narrow-construction rule "erased" any "doubts" about meaning of the limitations provision at issue). The narrow-construction canon is fully applicable here because the parties' dispute concerns the meaning of the terms "penalty" and "forfeiture" as they appear in Section 2462.

Petitioner asserts that the narrow-construction canon applies only "when [the government] sues to vindicate its own rights to money and property." Br. 46 (emphasis omitted). Petitioner cites no decision, however, that has announced such a limit on the scope of the interpretive rule. Nor would any such limit follow logically from the rationale for the canon itself, which rests on the government's sovereignty, not on the specific nature of its suit. See *BP Am.*, 549 U.S. at

95-96; *E.I. Dupont De Nemours*, 264 U.S. at 462; see, *e.g.*, *Badaracco* v. *Commissioner*, 464 U.S. 386, 390-391 (1984) (invoking the rule in case involving government collection of tax penalties, not just unpaid tax amounts).

Petitioner also relies on decisions construing statutes of limitations in circumstances that undoubtedly involved penalties. See Br. 47-48 (citing *Adams* v. *Woods*, 6 U.S. (2 Cranch) 336 (1805), and *United States* v. *Mayo*, 26 F. Cas. 1230 (C.C.D. Mass. 1813)). In *Adams*, the Court found no statutory ambiguity that would warrant the application of the narrow-construction canon. See 6 U.S. (2 Cranch) at 341. The Court also relied on the background understanding that actions for "penalties" are generally subject to *some* statute of limitations, see *id.* at 342, a premise that provides no assistance in determining what the statutory term "penalty" means. *Mayo* is similarly inapposite. That decision recited the same penalty-specific rationale as did *Adams*, see *Mayo*, 26 F. Cas. at 1231, and it turned on a choice among several potentially applicable limitations provisions. See *ibid.*

Finally, contrary to petitioner's suggestion (Br. 48), the government does not contend that Section 2462 is limited to forms of relief that are specifically identified as "fine[s], penalt[ies], or forfeiture[s]" in the statutes that authorize those remedies to be imposed. As explained above, courts have long viewed disgorgement awards as permissible exercises of the courts' statutory authority to enter injunctive relief in SEC enforcement suits. That derivation would not render Section 2462 inapplicable if the term "penalty" or "forfeiture" *clearly* encompassed disgorgement. At the very least, however, it is not clear that either term

encompasses a remedy that is not "intended to punish," *Gabelli*, 133 S. Ct. at 1223, but simply prevents the defendant from retaining his illicit gains. Under the narrow-construction canon, that is a sufficient ground for rejecting petitioner's interpretation of the contested statutory language.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
MALCOLM L. STEWART
Deputy Solicitor General
ELAINE J. GOLDENBERG
Assistant to the Solicitor General

SANKET J. BULSARA
Acting General Counsel
MICHAEL A. CONLEY
Solicitor
JACOB H. STILLMAN
Senior Advisor to the Solicitor
HOPE HALL AUGUSTINI
DANIEL STAROSELSKY
Senior Litigation Counsels
SARAH R. PRINS
Senior Counsel
Securities and Exchange Commission

MARCH 2017

APPENDIX

1. 28 U.S.C. 2462 provides:

Time for commencing proceedings

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

2. 15 U.S.C. 78u (2012 & Supp. III 2015) provides:

Investigations and actions

(a) Authority and discretion of Commission to investigate violations

(1) The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated, or, as to any act or practice, or omission to act, while associated with a member, formerly associated with a member, the rules of a registered clearing agency in which such person is a participant, or, as to any act or practice, or omission to act, while a participant, was a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a regis-

tered public accounting firm, a person associated with such a firm, or, as to any act, practice, or omission to act, while associated with such firm, a person formerly associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of such provisions, in the prescribing of rules and regulations under this chapter, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates.

(2) On request from a foreign securities authority, the Commission may provide assistance in accordance with this paragraph if the requesting authority states that the requesting authority is conducting an investigation which it deems necessary to determine whether any person has violated, is violating, or is about to violate any laws or rules relating to securities matters that the requesting authority administers or enforces. The Commission may, in its discretion, conduct such investigation as the Commission deems necessary to collect information and evidence pertinent to the request for assistance. Such assistance may be provided without regard to whether the facts stated in the request would also constitute a violation of the laws of the United States. In deciding whether to provide such assistance, the Commission shall consider whether (A) the requesting authority has agreed to provide reciprocal

assistance in securities matters to the Commission; and (B) compliance with the request would prejudice the public interest of the United States.

(b) Attendance of witnesses; production of records

For the purpose of any such investigation, or any other proceeding under this chapter, any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing.

(c) Judicial enforcement of investigative power of Commission; refusal to obey subpena; criminal sanctions

In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any

failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who shall, without just cause, fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, and other records, if in his power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

(d) Injunction proceedings; authority of court to prohibit persons from serving as officers and directors; money penalties in civil actions

(1) Whenever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, it may in its discretion bring an action in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United

States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices as may constitute a violation of any provision of this chapter or the rules or regulations thereunder to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this chapter.

(2) AUTHORITY OF COURT TO PROHIBIT PERSONS FROM SERVING AS OFFICERS AND DIRECTORS.—In any proceeding under paragraph (1) of this subsection, the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who violated section 78j(b) of this title or the rules or regulations thereunder from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 781 of this title or that is required to file reports pursuant to section 78*o*(d) of this title if the person's conduct demonstrates unfitness to serve as an officer or director of any such issuer.

(3) MONEY PENALTIES IN CIVIL ACTIONS.—

(A) AUTHORITY OF COMMISSION.—Whenever it shall appear to the Commission that any person has violated any provision of this chapter, the rules or regulations thereunder, or a cease-and-desist order entered by the Commission pursuant to section 78u-3 of this title, other than by committing a violation subject to a penalty pursuant to section 78u-1 of this title, the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, upon a proper

showing, a civil penalty to be paid by the person who committed such violation.

(B) AMOUNT OF PENALTY.—

(i) FIRST TIER.—The amount of the penalty shall be determined by the court in light of the facts and circumstances. For each violation, the amount of the penalty shall not exceed the greater of (I) $5,000 for a natural person or $50,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation.

(ii) SECOND TIER.—Notwithstanding clause (i), the amount of penalty for each such violation shall not exceed the greater of (I) $50,000 for a natural person or $250,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation, if the violation described in subparagraph (A) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(iii) THIRD TIER.—Notwithstanding clauses (i) and (ii), the amount of penalty for each such violation shall not exceed the greater of (I) $100,000 for a natural person or $500,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation, if—

(aa) the violation described in subparagraph (A) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and

(bb) such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.

(C) PROCEDURES FOR COLLECTION.—

(i) PAYMENT OF PENALTY TO TREASURY.—A penalty imposed under this section shall be payable into the Treasury of the United States, except as otherwise provided in section 7246 of this title and section 78u-6 of this title.

(ii) COLLECTION OF PENALTIES.—If a person upon whom such a penalty is imposed shall fail to pay such penalty within the time prescribed in the court's order, the Commission may refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court.

(iii) REMEDY NOT EXCLUSIVE.—The actions authorized by this paragraph may be brought in addition to any other action that the Commission or the Attorney General is entitled to bring.

(iv) JURISDICTION AND VENUE.—For purposes of section 78aa of this title, actions under this paragraph shall be actions to enforce a liability or a duty created by this chapter.

(D) SPECIAL PROVISIONS RELATING TO A VIOLATION OF A CEASE-AND-DESIST ORDER.—In an action to enforce a cease-and-desist order entered by the Commission pursuant to section 78u-3 of this title, each separate violation of such order shall be a separate offense, except that in the case of a violation through a continuing failure to comply with

the order, each day of the failure to comply shall be deemed a separate offense.

(4) PROHIBITION OF ATTORNEYS' FEES PAID FROM COMMISSION DISGORGEMENT FUNDS.—Except as otherwise ordered by the court upon motion by the Commission, or, in the case of an administrative action, as otherwise ordered by the Commission, funds disgorged as the result of an action brought by the Commission in Federal court, or as a result of any Commission administrative action, shall not be distributed as payment for attorneys' fees or expenses incurred by private parties seeking distribution of the disgorged funds.

(5) EQUITABLE RELIEF.—In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.

(6) AUTHORITY OF A COURT TO PROHIBIT PERSONS FROM PARTICIPATING IN AN OFFERING OF PENNY STOCK.—

(A) IN GENERAL.—In any proceeding under paragraph (1) against any person participating in, or, at the time of the alleged misconduct who was participating in, an offering of penny stock, the court may prohibit that person from participating in an offering of penny stock, conditionally or unconditionally, and permanently or for such period of time as the court shall determine.

(B) DEFINITION.—For purposes of this paragraph, the term "person participating in an offer-

ing of penny stock" includes any person engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of, any penny stock. The Commission may, by rule or regulation, define such term to include other activities, and may, by rule, regulation, or order, exempt any person or class of persons, in whole or in part, conditionally or unconditionally, from inclusion in such term.

(e) Mandamus

Upon application of the Commission the district courts of the United States and the United States courts of any territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus, injunctions, and orders commanding (1) any person to comply with the provisions of this chapter, the rules, regulations, and orders thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or person associated with a member, the rules of a registered clearing agency in which such person is a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm, the rules of the Municipal Securities Rulemaking Board, or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title, (2) any national securities exchange or registered securities association to enforce compliance by its members and persons associated with its members with the provisions of this chapter, the rules, regulations, and orders thereunder, and the rules

of such exchange or association, or (3) any registered clearing agency to enforce compliance by its participants with the provisions of the rules of such clearing agency.

(f) Rules of self-regulatory organizations or Board

Notwithstanding any other provision of this chapter, the Commission shall not bring any action pursuant to subsection (d) or (e) of this section against any person for violation of, or to command compliance with, the rules of a self-regulatory organization or the Public Company Accounting Oversight Board unless it appears to the Commission that (1) such self-regulatory organization or the Public Company Accounting Oversight Board is unable or unwilling to take appropriate action against such person in the public interest and for the protection of investors, or (2) such action is otherwise necessary or appropriate in the public interest or for the protection of investors.

(g) Consolidation of actions; consent of Commission

Notwithstanding the provisions of section 1407(a) of title 28, or any other provision of law, no action for equitable relief instituted by the Commission pursuant to the securities laws shall be consolidated or coordinated with other actions not brought by the Commission, even though such other actions may involve common questions of fact, unless such consolidation is consented to by the Commission.

(h) Access to records

(1) The Right to Financial Privacy Act of 1978 [12 U.S.C. 3401 et seq.] shall apply with respect to the Commission, except as otherwise provided in this subsection.

(2) Notwithstanding section 1105 or 1107 of the Right to Financial Privacy Act of 1978 [12 U.S.C. 3405 or 3407], the Commission may have access to and obtain copies of, or the information contained in financial records of a customer from a financial institution without prior notice to the customer upon an ex parte showing to an appropriate United States district court that the Commission seeks such financial records pursuant to a subpena issued in conformity with the requirements of section 19(b)[1] of the Securities Act of 1933, section 21(b) of the Securities Exchange Act of 1934 [15 U.S.C. 78u(b)], section 42(b) of the Investment Company Act of 1940 [15 U.S.C. 80a-41(b)], or section 209(b) of the Investment Advisers Act of 1940 [15 U.S.C. 80b-9(b)], and that the Commission has reason to believe that—

(A) delay in obtaining access to such financial records, or the required notices, will result in—

(i) flight from prosecution;

(ii) destruction of or tampering with evidence;

(iii) transfer of assets or records outside the territorial limits of the United States;

(iv) improper conversion of investor assets; or

(v) impeding the ability of the Commission to identify or trace the source or disposition of funds involved in any securities transaction;

(B) such financial records are necessary to identify or trace the record or beneficial ownership interest in any security;

---

[1] See References in Text note below.

(C) the acts, practices or course of conduct under investigation involve—

(i) the dissemination of materially false or misleading information concerning any security, issuer, or market, or the failure to make disclosures required under the securities laws, which remain uncorrected; or

(ii) a financial loss to investors or other persons protected under the securities laws which remains substantially uncompensated; or

(D) the acts, practices or course of conduct under investigation—

(i) involve significant financial speculation in securities; or

(ii) endanger the stability of any financial or investment intermediary.

(3) Any application under paragraph (2) for a delay in notice shall be made with reasonable specificity.

(4)(A) Upon a showing described in paragraph (2), the presiding judge or magistrate judge shall enter an ex parte order granting the requested delay for a period not to exceed ninety days and an order prohibiting the financial institution involved from disclosing that records have been obtained or that a request for records has been made.

(B) Extensions of the period of delay of notice provided in subparagraph (A) of up to ninety days each may be granted by the court upon application, but only in accordance with this subsection or section 1109(a), (b)(1), or (b)(2) of the Right to Financial Privacy Act of 1978 [12 U.S.C. 3409(a), (b)(1), or (b)(2)].

(C) Upon expiration of the period of delay of notification ordered under subparagraph (A) or (B), the customer shall be served with or mailed a copy of the subpena insofar as it applies to the customer together with the following notice which shall describe with reasonable specificity the nature of the investigation for which the Commission sought the financial records:

"Records or information concerning your transactions which are held by the financial institution named in the attached subpena were supplied to the Securities and Exchange Commission on (date). Notification was withheld pursuant to a determination by the (title of court so ordering) under section 21(h) of the Securities Exchange Act of 1934 that (state reason). The purpose of the investigation or official proceeding was (state purpose)."

(5) Upon application by the Commission, all proceedings pursuant to paragraphs (2) and (4) shall be held in camera and the records thereof sealed until expiration of the period of delay or such other date as the presiding judge or magistrate judge may permit.

(6) Repealed. Pub. L. 114-113, div. O, title VII, § 708, Dec. 18, 2015, 129 Stat. 3030.

(7)(A) Following the expiration of the period of delay of notification ordered by the court pursuant to paragraph (4) of this subsection, the customer may, upon motion, reopen the proceeding in the district court which issued the order. If the presiding judge or magistrate judge finds that the movant is the customer to whom the records obtained by the Commission pertain, and that the Commission has obtained financial records or information contained therein in violation of

this subsection, other than paragraph (1), it may order that the customer be granted civil penalties against the Commission in an amount equal to the sum of—

(i) $100 without regard to the volume of records involved;

(ii) any out-of-pocket damages sustained by the customer as a direct result of the disclosure; and

(iii) if the violation is found to have been willful, intentional, and without good faith, such punitive damages as the court may allow, together with the costs of the action and reasonable attorney's fees as determined by the court.

(B) Upon a finding that the Commission has obtained financial records or information contained therein in violation of this subsection, other than paragraph (1), the court, in its discretion, may also or in the alternative issue injunctive relief to require the Commission to comply with this subsection with respect to any subpoena which the Commission issues in the future for financial records of such customer for purposes of the same investigation.

(C) Whenever the court determines that the Commission has failed to comply with this subsection, other than paragraph (1), and the court finds that the circumstances raise questions of whether an officer or employee of the Commission acted in a willful and intentional manner and without good faith with respect to the violation, the Office of Personnel Management shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the agent or employee who was primarily responsible for the violation. After investigating and considering the

evidence submitted, the Office of Personnel Management shall submit its findings and recommendations to the Commission and shall send copies of the findings and recommendations to the officer or employee or his representative. The Commission shall take the corrective action that the Office of Personnel Management recommends.

(8) The relief described in paragraphs (7) and (10) shall be the only remedies or sanctions available to a customer for a violation of this subsection, other than paragraph (1), and nothing herein or in the Right to Financial Privacy Act of 1978 [12 U.S.C. 3401 et seq.] shall be deemed to prohibit the use in any investigation or proceeding of financial records, or the information contained therein, obtained by a subpoena issued by the Commission. In the case of an unsuccessful action under paragraph (7), the court shall award the costs of the action and attorney's fees to the Commission if the presiding judge or magistrate judge finds that the customer's claims were made in bad faith.

(9)(A) The Commission may transfer financial records or the information contained therein to any government authority if the Commission proceeds as a transferring agency in accordance with section 1112 of the Right to Financial Privacy Act of 1978 [12 U.S.C. 3412], except that the customer notice required under section 1112(b) or (c) of such Act [12 U.S.C. 3412(b) or (c)] may be delayed upon a showing by the Commission, in accordance with the procedure set forth in paragraphs (4) and (5), that one or more of subparagraphs (A) through (D) of paragraph (2) apply.

(B) The Commission may, without notice to the customer pursuant to section 1112 or the Right to

Financial Privacy Act of 1978 [12 U.S.C. 3412], transfer financial records or the information contained therein to a State securities agency or to the Department of Justice. Financial records or information transferred by the Commission to the Department of Justice or to a State securities agency pursuant to the provisions of this subparagraph may be disclosed or used only in an administrative, civil, or criminal action or investigation by the Department of Justice or the State securities agency which arises out of or relates to the acts, practices, or courses of conduct investigated by the Commission, except that if the Department of Justice or the State securities agency determines that the information should be disclosed or used for any other purpose, it may do so if it notifies the customer, except as otherwise provided in the Right to Financial Privacy Act of 1978 [12 U.S.C. 3401 et seq.], within 30 days of its determination, or complies with the requirements of section 1109 of such Act [12 U.S.C. 3409] regarding delay of notice.

(10) Any government authority violating paragraph (9) shall be subject to the procedures and penalties applicable to the Commission under paragraph (7)(A) with respect to a violation by the Commission in obtaining financial records.

(11) Notwithstanding the provisions of this subsection, the Commission may obtain financial records from a financial institution or transfer such records in accordance with provisions of the Right to Financial Privacy Act of 1978 [12 U.S.C. 3401 et seq.].

(12) Nothing in this subsection shall enlarge or restrict any rights of a financial institution to challenge requests for records made by the Commission under

existing law. Nothing in this subsection shall entitle a customer to assert any rights of a financial institution.

(13) Unless the context otherwise requires, all terms defined in the Right to Financial Privacy Act of 1978 [12 U.S.C. 3401 et seq.] which are common to this subsection shall have the same meaning as in such Act.

(i) Information to CFTC

The Commission shall provide the Commodity Futures Trading Commission with notice of the commencement of any proceeding and a copy of any order entered by the Commission against any broker or dealer registered pursuant to section 78*o*(b)(11) of this title, any exchange registered pursuant to section 78f(g) of this title, or any national securities association registered pursuant to section 78*o*-3(k) of this title.

3. 15 U.S.C. 7246 provides:

Fair funds for investors

(a) Civil penalties to be used for the relief of victims

If, in any judicial or administrative action brought by the Commission under the securities laws, the Commission obtains a civil penalty against any person for a violation of such laws, or such person agrees, in settlement of any such action, to such civil penalty, the amount of such civil penalty shall, on the motion or at the direction of the Commission, be added to and become part of a disgorgement fund or other fund established for the benefit of the victims of such violation.

(b) Acceptance of additional donations

The Commission is authorized to accept, hold, administer, and utilize gifts, bequests and devises of property, both real and personal, to the United States for a disgorgement fund or other fund described in subsection (a) of this section. Such gifts, bequests, and devises of money and proceeds from sales of other property received as gifts, bequests, or devises shall be deposited in such fund and shall be available for allocation in accordance with subsection (a) of this section.

(c) Study required

(1) Subject of study

The Commission shall review and analyze—

(A) enforcement actions by the Commission over the five years preceding July 30, 2002, that have included proceedings to obtain civil penalties or disgorgements to identify areas where such proceedings may be utilized to efficiently, effectively, and fairly provide restitution for injured investors; and

(B) other methods to more efficiently, effectively, and fairly provide restitution to injured investors, including methods to improve the collection rates for civil penalties and disgorgements.

(2) Report required

The Commission shall report its findings to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate within 180 days after of[1] July 30, 2002, and shall use such

---

[1] So in original. The word "of" probably should not appear.

findings to revise its rules and regulations as necessary. The report shall include a discussion of regulatory or legislative actions that are recommended or that may be necessary to address concerns identified in the study.

4. 15 U.S.C. 78t-1 provides:

Liability to contemporaneous traders for insider trading

(a) Private rights of action based on contemporaneous trading

Any person who violates any provision of this chapter or the rules or regulations thereunder by purchasing or selling a security while in possession of material, nonpublic information shall be liable in an action in any court of competent jurisdiction to any person who, contemporaneously with the purchase or sale of securities that is the subject of such violation, has purchased (where such violation is based on a sale of securities) or sold (where such violation is based on a purchase of securities) securities of the same class.

(b) Limitations on liability

(1) Contemporaneous trading actions limited to profit gained or loss avoided

The total amount of damages imposed under subsection (a) of this section shall not exceed the profit gained or loss avoided in the transaction or transactions that are the subject of the violation.

(2) Offsetting disgorgements against liability

The total amount of damages imposed against any person under subsection (a) of this section shall

be diminished by the amounts, if any, that such person may be required to disgorge, pursuant to a court order obtained at the instance of the Commission, in a proceeding brought under section 78u(d) of this title relating to the same transaction or transactions.

(3) Controlling person liability

No person shall be liable under this section solely by reason of employing another person who is liable under this section, but the liability of a controlling person under this section shall be subject to section 78t(a) of this title.

(4) Statute of limitations

No action may be brought under this section more than 5 years after the date of the last transaction that is the subject of the violation.

(c) Joint and several liability for communicating

Any person who violates any provision of this chapter or the rules or regulations thereunder by communicating material, nonpublic information shall be jointly and severally liable under subsection (a) of this section with, and to the same extent as, any person or persons liable under subsection (a) of this section to whom the communication was directed.

(d) Authority not to restrict other express or implied rights of action

Nothing in this section shall be construed to limit or condition the right of any person to bring an action to enforce a requirement of this chapter or the availability of any cause of action implied from a provision of this chapter.

(e) Provisions not to affect public prosecutions

This section shall not be construed to bar or limit in any manner any action by the Commission or the Attorney General under any other provision of this chapter, nor shall it bar or limit in any manner any action to recover penalties, or to seek any other order regarding penalties.